99th Congress
2d Session

SENATE

S. Doc.
99–48

PROCEEDINGS OF THE UNITED STATES SENATE

IN THE

IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

October 15, 1986.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
69–078 O WASHINGTON : 1987

S 920-4

UNITED STATES SENATE

October 15

Mr. Mathias. I ask unanimous consent that the proceedings of the Senate, sitting in open session as a court of impeachment to consider the articles of impeachment against United States District Judge Harry E. Claiborne of the District of Nevada; together with statements submitted for the record; briefs, memoranda, and motions submitted by the parties to the Senate following the completion of the Senate Impeachment Trial Committee's hearings on September 23, 1986; legislative proceedings relating to this matter; and briefs filed in the Federal courts by both Judge Claiborne and the Senate and relevant judicial orders; be separately printed for the use of the Senate. I further ask that 300 copies be printed for the use of the Senate Impeachment Trial Committee and 300 copies be printed for the use of the Secretary of the Senate.

CONTENTS

Page

Presentation of Articles of Impeachment against Harry E. Claiborne to the United States Senate by Managers on behalf of the United States House of Representatives 1
Introduction and passage of Senate Resolution 476, setting the date and time for the United States Senate to proceed with the consideration of the Articles of Impeachment 3
  S. Res. 476 5
Administration of oath to the Members of the United States Senate and adoption of Senate Resolutions 480 and 481 providing for the issuance of a summons and appointment of the Senate Impeachment Trial Committee 6
  S. Res. 480 9
  S. Res. 481 11
Statement of Senator Charles McC. Mathias, Jr., with attached correspondence between Representative Peter W. Rodino, Jr., Senator Strom Thurmond, Senator Robert Dole, Senator Robert C. Byrd, and Oscar B. Goodman, counsel for Judge Harry E. Claiborne 18
Report of the Senate Impeachment Trial Committee 21
Post-Trial Brief of the Managers on the part of the United States House of Representatives; Notice of Filing; and Memorandum on the Constitutionally Required Standards for Conviction Applicable to the Four Articles of Impeachment 25
Notice of Filing submitted by Oscar B. Goodman and the Honorable Howard W. Cannon on behalf of Harry E. Claiborne 46
  Post Evidentiary Hearing Brief 46
  Supplemental Motion for Full and Fair Impeachment Trial Before the Entire Senate of the United States, or in the Alternative Dismissal 56
  Supplemental Points and Authorities Re: Collateral Estoppel and Summary Disposition of Third Article of Impeachment 64
  Motion to Postpone the Hearing on Articles of Impeachment until the Resolution of the Supplemental Section 2255 Motion by the District Court or the Ninth Circuit Court of Appeals 69
  Amended and Supplementary Motion to (1) Vacate Sentence; (2) For Evidentiary Hearing; (3) For Discovery Proceedings and (4) For New Trial 70
  Application for Issuance of Subpoenas for Full and Fair Impeachment Trial Before Full Senate 78
Unanimous consent agreements fixing date and time for deliberation by the United States Senate on the Articles of Impeachment 82
Statement of Senator Alan K. Simpson, and Order fixing date and time for the United States Senate to sit as a Court of Impeachment 83
Oral argument on Judge Claiborne's Motion to Postpone Hearing on Articles of Impeachment 88
Oral argument on Judge Claiborne's Motion to Declare Senate Impeachment Rule XI Unconstitutional 95
Oral argument on Judge Claiborne's Motion to Designate Beyond a Reasonable Doubt as the Standard of Proof in an Impeachment Trial 105
Voice vote on the motion by Senator Howell Heflin and Senator John W. Warner to postpone the decisions on all the motions except for the first motion to postpone until the conclusion of the presentation by the managers and the defendant 109
Voice vote on Judge Claiborne's Motion to Postpone the Hearing on Articles of Impeachment until the Resolution of the Supplemental Section 2255 Motion by the District Court or the Ninth Circuit Court of Appeals 109
Presentation of closing arguments by House Managers 110

Page

Presentation of closing arguments by Judge Claiborne and counsel 123
Rollcall vote on Judge Claiborne's Motion to Designate Beyond a Reasonable Doubt as the Standard of Proof 150
Rollcall vote on motion by Senator Dole that the Senate not hear additional witnesses 156
Passage of Senate Resolution 501 authorizing the Senate Legal Counsel to defend the Senate in *Harry E. Claiborne* v. *United States Senate, et al* 157
  S. Res. 501 159
Harry E. Claiborne's Emergency Application for Temporary Restraining Order and Preliminary Injunction Pending Appeal filed in the United States Supreme Court in *Harry E. Claiborne* v. *United States Senate, et al* 162
  Complaint for Declaratory and Injunctive Relief filed in the United States District Court for the District of Columbia 164
  Emergency Motion for Summary Reversal and Injunctive Relief filed in the United States Court of Appeals for the District of Columbia Circuit. 174
    Order filed by United States District Court Judge Harold H. Greene, denying Harry E. Claiborne's motion for a temporary restraining order 188
    Motion for Temporary Restraining Order and Preliminary Injunction filed in the United States District Court for the District of Columbia 195
    Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order 200
    Affidavit of Oscar B. Goodman, Esq 220
    Memorandum of Defendants in Opposition to Application for a Temporary Restraining Order filed in the United States District Court for the District of Columbia 223
  Order filed in the United States Court of Appeals for the District of Columbia Circuit denying Harry E. Claiborne's motion for injunctive relief in *Harry E. Claiborne* v. *United States Senate, et al* 258
Opposition to Application for Injunction filed by the United States Senate in the United States Supreme Court in *Harry E. Claiborne* v. *United States Senate, et al* 259
Letter from the Clerk of the United States Supreme Court indicating that Harry E. Claiborne's application for a temporary restraining order had been denied by Chief Justice William H. Rehnquist and Justice Thurgood Marshall 288
Unanimous consent agreements pertaining to the impeachment trial schedule 289
Votes on the Articles of Impeachment 291
Judgment of the United States Senate 298

STATEMENTS SUBMITTED FOR THE RECORD BY MEMBERS OF THE UNITED STATES SENATE REGARDING THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE

Authorization for Filing Statements 301
Statement of:
  Senator Jeff Bingaman 301
  Senator Orrin G. Hatch 303
  Senator Alan J. Dixon 312
  Senator Arlen Specter 313
  Senator David Pryor 315
  Senator Howell Heflin 317
  Senator Dennis DeConcini 319
  Senator Robert C. Byrd 321
  Senator Ted Stevens 335
  Senator Spark Matsunaga 336
  Senator George J. Mitchell 337
  Senator Mitch McConnell 339
  Senator Charles McC. Mathias, Jr. 341
  Senator Dale Bumpers 352
  Senator J. James Exon 355
  Senator Daniel J. Evans 358
  Senator Carl Levin 361
  Senator Albert Gore, Jr 366
  Senator Charles McC. Mathias, Jr., commending the work of the Senate Impeachment Trial Committee Staff 372

[Congressional Record—October 6, 1986—S 10535]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

At 2:03 p.m., the managers on the part of the House of Representatives of the impeachment of Harry E. Claiborne appeared below the bar of the Senate, and the secretary to the majority, Howard O. Greene, Jr., announced their presence, as follows:

Mr. President, I announce the presence of the managers on the part of the House of Representatives to conduct the proceedings of the impeachment of Harry E. Claiborne, U.S. district judge in and for the district of Nevada.

The VICE PRESIDENT. The managers on the part of the House will be received and assigned their seats.

The managers, accompanied by the Sergeant at Arms of the House of Representatives, Jack Russ, were thereupon escorted by the Sergeant at Arms of the Senate, Ernest Garcia, to the seats assigned to them in the area in front of the Chair.

The VICE PRESIDENT. The Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Ernest Garcia, made the proclamation, as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silent, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Harry E. Claiborne, U.S. district judge for the district of Nevada.

The VICE PRESIDENT. The managers on the part of the House will proceed.

Mr. Manager RODINO. Mr. President, the managers on the part of the House of Representatives are here present and ready to present the Articles of Impeachment which have been preferred by the House of Representatives against Harry E. Claiborne, a district judge of the United States for Nevada.

The House adopted the following resolution, which with the permission of the Senate I will read.

H.R. 501

IN THE HOUSE OF REPRESENTATIVES, U.S.,

July 22, 1986.

Resolved, That Peter W. Rodino, Jr., Robert W. Kastenmeier, William J. Hughes, Romano L. Mazzoli, Dan Glickman, Hamilton Fish, Jr., Henry J. Hyde, Thomas N. Kindness, and Michael DeWine, Members of the House of Representatives, are hereby appointed managers to conduct the impeachment trial against Harry E. Claiborne, judge of the United States District Court for the District of Nevada. These managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to try the impeachment of Harry E. Claiborne of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against that judge which have been agreed upon by the House of Representatives. These managers shall demand that the Senate take order for the appearance of Harry E. Claiborne to answer such impeachment, and demand his conviction and appropriate judgment thereon.

With the permission of the President of the Senate, I will now read the Articles of Impeachment, House Resolution 461.

H. RES. 461

IN THE HOUSE OF REPRESENTATIVES, U.S.,

July 22, 1986.

Impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of High Crimes and Misdemeanors

Resolved, That Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior, and for high crimes and misdemeanors; that the evidence heretofore taken by a subcommittee of the Committee on the Judiciary of the House of Representatives sustains articles of impeachment, which are hereinafter set out; and that the articles be adopted by the House of Representatives and exhibited to the Senate:

Articles of Impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Judge Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, in maintenance and support of its impeachment against him for misbehavior and for high crimes and misdemeanors.

ARTICLE I

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court of the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribed a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $80,227.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States Court of the District of Nevada.

Whereas, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, such conduct, warrants impeachment and trail and removal from office.

ARTICLE II

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Whereas, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

Article III

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

On August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of title 26, United States Code.

Thereafter, a judgment of conviction was entered against Judge Harry E. Claiborne for each of the violations of section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5000 for each violation.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.

Article IV

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

The **Vice President**. The Senate will take proper order and notify the House of Representatives.

Mr. **Dole**. Mr. President, I suggest the absence of a quorum.

The **Vice President**. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

[Congressional Record—August 12, 1986—S 11434]

DATE FOR PROCEEDING TO CONSIDERATION OF ARTICLES OF IMPEACHMENT

Mr. **Simpson**. Mr. President, I send a resolution to the desk on behalf of Senators Dole and Byrd and ask for its immediate consideration.

The **Presiding Officer**. The clerk will report.

The legislative clerk read as follows:

A resolution (S. Res. 476) to establish a date for proceeding to the consideration of Articles of Impeachment.

Mr. **Simpson**. This is a resolution to establish a date and time for proceeding to consideration of the Articles of Impeachment, exhibited to the Senate on Wednesday last.

Mr. President, on August 6, 1986, Managers on the part of the House of Representatives exhibited to the Senate Articles of Impeachment against Harry E. Claiborne, a judge of the U.S. District Court for the District of Nevada. After the House Managers exhibited the articles, the President of the Senate announced that the Senate would take proper order and notify the House of Representatives.

The following day, August 7, the Senate reached a unanimous consent agreement not to proceed to the consideration of the Articles of Impeachment until a time to be fixed later by the Senate.

We are now prepared to fix a date and time for the Senate to accomplish several preliminary matters in preparation for the impeachment trial.

These include the administration of the oath to Members of the Senate, as required by the Constitution when the Senate sits for the purpose of trying an impeachment, and the issuance of a summons to the impeached official.

To accomplish these and other preliminary matters, our resolution provides that the Senate, sitting as a Court of Impeachment, shall proceed, on August 14, 1986, to the consideration of the Articles of Impeachment which have been exhibited against Harry E. Claiborne. All Members are requested to be in the Senate Chamber at that time that will be specified, so that the oath may be administered conveniently to the entire membership.

It will also be our intention to call for the establishment of a committee as provided for under the rules whose purpose it will be to receive evidence and prepare a report to the Senate. The members of that committee will also be announced on Thursday.

By proceeding in this fashion, it is our hope that the preliminary work can be done during the recess so that active work on the trial can begin as quickly as possible in September.

Mr. **Simpson**. Mr. President, I move adoption of the resolution.

The **Presiding Officer**. The question is on agreeing to the resolution.

The resolution (S. Res. 476) was agreed to, as follows:

S. Res. 476

Resolved, That on August 14, 1986, the Senate, sitting as a court of impeachment, shall proceed to the consideration of the articles of impeachment which have been exhibited against Judge Harry E. Claiborne.

Sec. 2. The Secretary of the Senate shall so notify the House of Representatives.

Mr. **Simpson**. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. **Sasser**. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

[S. Res. 476 follows:]

III

99TH CONGRESS
2D SESSION

S. RES. 476

To establish a date and time for proceeding to the consideration of articles of impeachment.

IN THE SENATE OF THE UNITED STATES

AUGUST 12 (legislative day, AUGUST 11), 1986

Mr. SIMPSON (for Mr. DOLE) (for himself and Mr. BYRD) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

To establish a date and time for proceeding to the consideration of articles of impeachment.

Resolved, That on August 14, 1986, the Senate, sitting as a court of impeachment, shall proceed to the consideration of the articles of impeachment which have been exhibited against Judge Harry E. Claiborne.

SEC. 2. The Secretary of the Senate shall so notify the House of Representatives.

○

[Congressional Record—August 14, 1986—S 11672]

THE IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Mr. **Dole**. Mr. President, I move that the senior Senator from Mississippi, Mr. Stennis, who is the senior Senator in point of service in the Senate, be now designated by the Senate to administer the oath to the Vice President, who will be the Presiding Officer of the Court of Impeachment when he is present, and to the President pro tempore, Mr. Thurmond, who will be the Presiding Officer of the Court of Impeachment in the absence of the Vice President.

The **Vice President**. Without objection, it is so ordered.

Mr. **Stennis**. You do solemnly swear that in all things appertaining to the trial of the impeachment of Harry E. Claiborne, a judge of the U.S. District Court for the District of Nevada, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. **Thurmond**. I do.

The **Vice President**. I do.

Mr. **Dole**. I thank the distinguished Senator from Mississippi.

Mr. President, at this time the oath should be administered to all the Senators. If any Senator has cause to be excused from this service, now is the appropriate time to make that known. If there is no Senator who desires to be excused, I move that the Presiding Officer administer the oath to the Senators, so that they may form a Court of Impeachment.

The **Vice President**. Is there objection? The Chair hears none, and it is so ordered. Senators shall now be sworn.

You do solemnly swear that in all things appertaining to the trial of the impeachment of Harry E. Claiborne, a judge of the U.S. District Court for the District of Nevada, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Senators. I do.

The **Vice President**. Any Senator who was not in the Senate Chamber at the time the oath was administered to the other Senators will make the fact known to the Chair so that the oath may be administered as soon as possible to the Senator.

The majority leader.

Mr. **Dole**. I thank the distinguished Presiding Officer.

The Secretary will note the names of the Senators who have been sworn, and will present them for signature a book which will be the Senate's permanent record of the swearing-in of the Members of this body.

Mr. President, on behalf of myself and the distinguished minority leader, Mr. Byrd, I send to the desk a resolution for the issuance of a summons with respect to the articles of impeachment against Judge Harry E. Claiborne, and ask for its immediate consideration.

Mr. President, now that the oath has been administered, the next procedural step in these impeachment proceedings is to provide for the issuance of the summons to Judge Claiborne. The summons directs the impeached officer to answer the articles of impeachment within a designated time and thereafter to abide by and obey the further orders, directions, and judgments which the Senate shall make. In accordance with the practice of prior impeachment, the managers on the part of the House will have the opportunity to file a reply, formally known as a replication, to the answer. The Sergeant at Arms will serve the summons on the impeached officer.

The VICE PRESIDENT. The clerk will report the resolution.

The legislative clerk read as follows:

A resolution (S. Res. 480) to provide for the issuance of a summons and for related procedures concerning the articles of impeachment against Harry Claiborne.

The VICE PRESIDENT. The question is on the adoption of the resolution.

The resolution (S. Res. 480) was agreed to, as follows:

Resolved, A summons shall be issued which commands Harry E. Claiborne to file with the Secretary of the Senate an answer to the articles of impeachment no later than September 8, 1986, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

SEC. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

SEC. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

SEC. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than the September 15, 1986.

SEC. 5. The Secretary shall notify counsel for Harry E. Claiborne of the filing of a replication, and shall provide counsel with a copy.

SEC. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

SEC. 7. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 8. The Secretary shall notify the House of Representatives of this resolution.

Mr. DOLE. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. DOLE. Mr. President, on behalf of myself and the distinguished minority leader, Mr. Byrd, I send to the desk a resolution for the appointment of a committee to receive and to report evidence with respect to the articles of impeachment against Judge Harry E. Claiborne, and ask for its immediate consideration.

The VICE PRESIDENT. The resolution will be stated by title.

The legislative clerk reads as follows:

A resolution (S. Res. 481) to provide for the appointment of a committee to receive and to report evidence with respect to the articles of impeachment against Harry E. Claiborne.

The VICE PRESIDENT. The question is on the adoption of the resolution.

The resolution (S. Res. 481) was agreed to as follows:

S. RES. 481

Resolved, Pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the power provided for in the rule.

Sec. 2. The Majority and the Minority Leader shall each recommend six Members to the Presiding Officer for appointment to the committee.

Sec. 3. Necessary expenses of the committee shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee.

Sec. 4. The committee shall be deemed to be a standing committee of the Senate for the purpose of printing reports, hearings, and other documents for submission to the Senate under Rule XI.

Sec. 5. The Secretary shall notify the House of Representatives of this resolution.

Mr. Dole. Mr. President. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. Byrd. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

[S. Res. 480 and 481 follow:]

III

99TH CONGRESS
2D SESSION

S. RES. 480

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against Harry E. Claiborne.

IN THE SENATE OF THE UNITED STATES

AUGUST 14 (legislative day, AUGUST 11), 1986

Mr. DOLE (for himself and Mr. BYRD) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

To provide for issuance of a summons and for related procedures concerning the articles of impeachment against Harry E. Claiborne.

Resolved, A summons shall be issued which commands Harry E. Claiborne to file with the Secretary of the Senate an answer to the articles of impeachment no later than September 8, 1986, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

SEC. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

SEC. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

SEC. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than September 15, 1986.

SEC. 5. The Secretary shall notify counsel for Harry E. Claiborne of the filing of a replication, and shall provide counsel with a copy.

SEC. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

SEC. 7. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 8. The Secretary shall notify the House of Representatives of this resolution.

○

99TH CONGRESS
2D SESSION

S. RES. 481

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne.

IN THE SENATE OF THE UNITED STATES

AUGUST 14 (legislative day, AUGUST 11), 1986

Mr. DOLE (for himself and Mr. BYRD) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne.

Resolved, Pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The Majority and Minority Leader shall each recommend six Members to the Presiding Officer for appointment to the committee.

SEC. 3. Necessary expenses of the committee shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee.

SEC. 4. The committee shall be deemed to be a standing committee of the Senate for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

SEC. 5. The Secretary shall notify the House of Representatives of this resolution.

O

Mr. Dole. Mr. President, this resolution, which the distinguished minority leader, Mr. Byrd, and I believe will facilitate the Senate's ability to render a fair and informed judgment at the impeachment trial of Judge Harry E. Caliborne, involves the first utlization of a procedure authorized by rule XI of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials.

Rule XI provides in part "(t)hat in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony. * * * the committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee. * * * The rule explicity preserves "the right of the Senate to determine competency relevancy, and materially." The rule also specifically reserves the right to the Senate to hear directly the testimony of witnesses by providing that "Nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by Order of the Senate having the entire trial in open Senate."

The history of rule XI, which was debated in 1934 and adopted in 1935, makes clear that the drafters did not intend to substitute the committee's judgment for that of the Senate on the ultimate question of whether the impeached official should be convicted. The committee is not to make any recommendation to the Senate on that question.

Through these means the full Senate retains "the sole power" to determine the facts and law in an impeachement trial. As Senator Norris stated during the Senate's consideration of rule XI, the Senate would only be "delegat(ing) to a committee the tedious task of taking the evidence * * * the trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it."

Rule XI presently provides that the committees shall consist of 12 members who shall be appointed by the Presiding Officer. The distinguished minority leader and I have agreed that each of us will recommend six members to the Presiding Officer. Rule XI further provides that the members of the committee shall elect a chairman. We recommend to the committee that it also elect a vice chairman from the other party.

I recommend to the Presiding Officer the following Senators for appointment to the committee under impeachment rule XI: Senators Mathias, Hatch, Warner, Rudman, Pressler, and McConnell.

Mr. Byrd. Mr. President, on behalf of the minority, I recommend to the distinguished Presiding Officer that the following Senators be appointed to serve on the committee of 12 under impeachment rule XI: Senators Heflin, DeConcini, Sarbanes, Pryor, Gore, and Bingaman.

The Vice President. Senators Mathias, Hatch, Warner, Rudman, Pressler, McConnell, and Senators Heflin, DeConcini, Sarbanes, Pryor, Gore, and Bingaman are hereby appointed to be members of the committee appointed under impeachment rule XI.

Mr. Dole. Mr. President, I ask unanimous consent that the articles of impeachment, the writ of summons, and the precept be printed as a Senate document.

The VICE PRESIDENT. Without objection, it is so ordered.

The articles of impeachment, the writ of summons, and the precept are printed as follows:

H. RES. 461

IN THE HOUSE OF REPRESENTATIVES, U.S.,

July 22, 1986.

Impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of High Crimes and Misdemeanors.

Resolved, That Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior, and for high crimes and misdemeanors; that the evidence heretofore taken by a subcommittee of the Committee on the Judiciary of the House of Representatives sustains articles of impeachment, which are hereinafter set out; and that the articles be adopted by the House of Representatives and exhibited to the Senate:

Articles of Impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Judge Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, in maintenance and support of its impeachment against him for misbehavior and for high crimes and misdemeanors.

ARTICLE I

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court of the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribed a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $80,227.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States Court of the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, such conduct, warrants impeachment and trial and removal from office.

ARTICLE II

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1981, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is found guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

ARTICLE III

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

On August 10, 1984, in the United States District Court of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of title 26, United States Code.

Thereafter, a judgement of conviction was entered against Judge Harry E. Claiborne for each of the violations of section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed to be served concurrently, together with a fine of $5000, for each violation.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.

ARTICLE IV

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphhold and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income tax on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

U.S. SENATE,
Washington, DC.

The United States of America:

The Senate of the United States to Ernest E. Garcia, Sergeant at Arms, United States Senate, greeting:

You are hereby commanded to deliver to and leave with Harry E. Claiborne, if conveniently to be found, or if not, to leave at his usual place of abode, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least fifteen days before the answer day mentioned in the said writ of summons.

Fail not, and make return of this writ of summons and precept, with your preceedings thereon indorsed, on or before the day for answering mentioned in the said writ of summons.

Witnesses George Bush, Vice President of the United States, and President of the Senate, at Washington, D.C., This 14th day of August, in the year of our Lord 1986, and of the Independence of the United States the two hundred and tenth.

JO-ANNE L. COE,
Secretary of the Senate.

U.S. SENATE,
Washington, DC.

The United States of America:

The Senate of the United States to Harry E. Claiborne, greeting:

Whereas the House of Representatives of the United States of America did, on the sixth day of August, 1986, exhibit to the Senate articles of impeachment against you, the said Harry E. Claiborne, in the words following:

"Articles of Impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Judge Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, in maintenance and support of its impeachment against him for misbehavior and for high crimes and misdemeanors.

ARTICLE I

"That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

"On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $80,227.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to the stated on the return in violation of section 7206(1) of title 26, United States Code.

"The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

"Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impreachment and trail and removal from office.

ARTICLE II

"That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

"On or about June 15, 1981, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

"The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

"Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is gulity of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

ARTICLE III

"That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

"On August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of title 26, United States Code.

"Thereafter, a judgment of conviction was entered against Judge Harry E. Claiborne for each of the violations of section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5000 for each violation.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.

ARTICLE IV

That Judge Harry E. Claiborne, having been nominated by the President of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

"Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States.

"Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

"Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

"Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office."

And demand that you, the said Harry E. Claiborne, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice.

You, the said Harry E. Claiborne, are therefore hereby summoned to file with the Secretary of the United States Senate, S-221 The Capitol, Washington, D.C., 20510, an answer to the said articles of impeachment no later than the close of business on the 8th day of September, 1986, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness George Bush, Vice President of the United States, and President of the Senate, at Washington, D.C., this 14th day of August, in the year of our Lord 1986, and of the Independence of the United States the two hundred and tenth.

JO-ANNE L. COE,
Secretary of the Senate.

CONCLUSION

Mr. DOLE. This completes the actions which the Senate must take today with respect to the Articles of Impeachment. The committee appointed under impeachment rule XI will be in communication with the House managers and counsel for Judge Claiborne to arrange for the proceedings before it. Counsel for the parties should be ready on September 15, at the latest, to present their witnesses and documents to the committee. It is my hope that the week of September 22 would be utilized to complete the printing of the record compiled before the committee for submission to the full Senate on September 29 or as soon thereafter as the Senate, sitting as a Court of Impeachment, can hear them.

I ask unanimous consent that the Senate, sitting as a Court of Impeachment, now adjourn until a time to be fixed later by the Senate.

I thank my colleagues.

The VICE PRESIDENT. Without objection, it is so ordered.

Thereupon, at 4:01 p.m., the Senate, sitting as a Court of Impeachment, adjourned until a time to be fixed later by the Senate.

[Congressional Record—October 1, 1986—S 14382]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Mr. MATHIAS. Mr. President, at this time I submit the report of the committee appointed by the Senate under rule XI for the purposes of taking evidence in the matter of the impeachment of Harry Claiborne, and I herewith submit this report to the Senate. While I am waiting for the page to take it, I might advise all Members the report is here and in their idle hours in the next few days it will provide them with plenty of reading material.

The PRESIDING OFFICER. The report will be received.

Mr. MATHIAS. Mr. President, pursuant to Senate Resolution 481, adopted by the Senate on August 14, 1986, a committee was established to receive evidence and take testimony relating to the Articles of Impeachment against Judge Harry E. Claiborne, which the House of Representatives exhibited to the Senate on August 6, 1986. I was honored to be appointed to this committee by the Vice President, on the recommendation of the distinguished majority leader, and to be elected chairman by my colleagues on the committee. I also was pleased when my fellow Marylander, Senator Paul Sarbanes, was elected vice chairman. It was a privilege to serve with Senator Sarbanes, and 10 other of my distinguished colleagues in this historic proceeding: Senators Hatch, Warner, Rudman, Pressler, McConnell, Heflin, DeConcini, Pryor, Gore, and Bingaman.

The cooperation and diligent contributions of all its members allowed the committee to adhere to a strict schedule of meetings and hearings over 9 long days. The voluminous record produced by the committee reflects the extraordinary amount of work of its members, their designated staff representatives, and the committee staff.

Mr. President, the committee sailed in uncharted waters, and the active participation in this arduous work on the part of every committee member made it possible for us to fulfill our responsibility in an orderly and timely way. The work of this committee has a special value that will be recognized in the years ahead.

Now, Mr. President, in accordance with rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, we "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee."

Mr. President, I will conclude with three brief matters. The first pertains to the briefs that the House managers and the counsel for Judge Claiborne were directed to file at the conclusion of the committee's evidentiary hearings. Subsequent to that committee order, the Chairman of the House managers, Representative Peter W. Rodino, Jr., objected to the committee's order, by letter of September 26, 1986, to the Vice President. As a result, the Senate leadership responded to Chairman Rodino by letter of September 27, 1986, modifying the committee's briefing order to permit the parties to limit their briefs to the legal issues which are presented by the Articles of Impeachment. These briefs are to be filed no later than Wednesday, October 1, 1986. The consequence of this modification is reflected in the committee's report, which I have just filed. I have also received a telegram from Judge Claiborne's counsel, Oscar Goodman, expressing Mr. Goodman's objection to both Chairman Rodino's letter and the response of the Senate leadership. I ask unanimous consent that these two letters and the telegram be printed at this point in today's Record. In response to the suggestion of Judge Clairborne's counsel, I had a conference call yesterday with counsel for both parties. It is my hope that both sides will be filing briefs today which explore all issues that are germane to our deliberations next week.

I ask further that House Resolution 461, which contains the Articles of Impeachment against Harry E. Claiborne, together with Judge Claiborne's answers to the articles, and the reply of the House managers to Judge Claiborne's answers, be printed for the use of the Senate.

Finally, I would congratulate the success of the enormous efforts of the staff of the Government Printing Office in producing over the past weekend the printed report of the Senate Impeachment Trial Committee's evidentiary hearings for use by the Senate in the continuation of these proceedings.

There being no objection, the material was ordered to be printed in the Record, as follows:

CONGRESS OF THE UNITED STATES,
Washington, DC, September 26, 1986.

Re: Impeachment of Harry E. Claiborne.
Hon. GEORGE BUSH,
President of the Senate,
U.S. Senate, Washington, DC.

DEAR MR. PRESIDENT. The Senate Impeachment Trial Committee has requested that the parties file with the Senate a post-trial brief arguing the law and summarizing the envidentiary record developed before the Committee. The parties have been asked to file this brief by Tuesday, September 30, 1986.

It is my understanding that the Senate may be considering seriously the receipt of additional evidence before the full Senate. At the outset, the House of Representatives respectfully submits that the Senate should not re-examine witnesses who already have testified before the Senate Impeachment Trial Committee. The spontaneity of testimony on cross-examination can not be recreated. Witnesses will anticipate the examination and more effectively temper their responses. If the Senate wishes to observe the demeanor of the witnesses, it may do so most realistically by examining the videotape of the proceedings. The House of Representatives notes that demeanor is but one element of credibility; the credibility of witnesses also must be judged by the logic and the consistency of their testimony and by the relationship of that testimony to the documentary evidence.

The potential acceptance of further testimony and evidence presents an additional problem. On behalf of the managers of the House of Representatives, I submit that it is not appropriate to file a post-trial brief until the record in fact is closed. To provide Judge Claiborne with the post-trial brief filed by the House of Representatives, which will provide a detailed analysis of the significance of the evidence presented, and then to permit Judge Claiborne or other witnesses to take the stand again would be fundamentally unfair. It is not simply the rights of Judge Claiborne that must be considered in this proceeding. Accordingly, the House of Representatives submits that it must postpone the filing of its post-trial brief until there is some indication from the Senate of its intentions with respect to the rehearing of testimony offered before the Committee or the taking of additional evidence.

The managers of the House of Representatives stand ready to file a post-trial brief as soon as this issue is clarified.

Sincerely,

PETER W. RODINO, Jr.

U.S. SENATE,
Washington, DC, September 27, 1986.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: We have received and considered your letter of September 26, 1986, to the President of the Senate in which you state that the House wishes to postpone the filing of its post-trial brief with respect to the Articles of Impeachment it has exhibited against Judge Harry E. Claiborne. We will modify the briefing order to permit the parties to limit their briefs to the legal issues which are presented by the Articles of Impeachment. The parties are directed to file these briefs no later than Wednesday, October 1.

Sincerely,

STROM THURMOND,
President pro tempore,
ROBERT DOLE,
Majority Leader,
ROBERT C. BYRD,
Minority Leader.

[Telegram]

Re: Impeachment of Harry E. Claiborne.
Hon. CHARLES McC. MATHIAS, Jr.,
U.S. Senate,
Washington, DC.

DEAR MR. PRESIDENT: On behalf of the honorable Harry E. Claiborne I respectfully request that I be permitted an immediate opportunity to be heard by the Senate committee chaired by Senator Mathias, since it has full plenary power of the Senate within the narrow confines of Rule XI, in response to the demand of the Honorable Peter Rodino.

It is respectfully submitted that we have acted in good faith on Judge Claiborne's behalf in an attempt to comply with Chairman Mathias's order of September 24, 1986 and have exhausted our energies to satisfy his directives. To modify the same at this time would be disruptive and fundamentally unfair. We recognize the sense of expediency, but we pray that the matter be given careful attention in order to assure a fair presentation of the judge's case. I am available for conference call at your immediate convenience.

Respectively,

OSCAR B. GOODMAN,
Attorney for Judge Claiborne.

[Report 99-511 follows:]

99TH CONGRESS
2d Session

SENATE

REPORT
99-511

ON THE IMPEACHMENT OF HARRY E. CLAIBORNE

OCTOBER 1 (legislative day, SEPTEMBER 24), 1986.—Ordered to be printed

Mr. MATHIAS, from the Senate Impeachment Trial Committee, submitted the following

REPORT

[Pursuant to the provisions of Senate Resolution 481, August 14, 1986, and Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials]

COMMITTEE REPORT

Pursuant to Senate Resolution 481 of the 99th Congress, agreed to on August 14, 1986, this Committee has received evidence and has taken testimony relating to the Articles of Impeachment which the House of Representatives has exhibited against United States District Judge Harry E. Claiborne. Now, in accordance with Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, we "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee. . . ." Senate Impeachment Rule XI does not authorize the Committee to make recommendations to the Senate, and our report contains none. The full text of Rule XI is reprinted as an addendum to this report.

The proceedings before the Committee are printed in Senate Hearing Report 99-812, which is comprised of four parts and an addendum. The Committee hereby certifies the hearing report to be a copy of the transcript of the proceedings and testimony had and given before it.

Part 1 of the hearing report is a transcript of (1) the Committee's organizational meeting of August 15, 1986; (2) the Committee's meetings of September 10 and 15, 1986, at which the Committee heard argument on pretrial motions; and (3) the continuation of the Committee's meeting of September 15, and the Committee's meetings of September 16, 17, 18, 19, 22, and 23, 1986, at which the Committee heard testimony. A certified transcript of Judge Claiborne's second trial in the United States District Court for the Disrict of Nevada is printed in Part 2 of the hearing report, and at pages 997-1588 of Part 3 of the hearing report. This is the trial which resulted in Judge Claiborne's conviction. Part 3 of the hearing report, at pages 1589-1636, reprints appellate decisions relating to Judge Claiborne's indictment and conviction. A certified copy of Judge Claiborne's testimony at his first trial is reprinted at pages 1637-1945 of Part 3. Judge Claiborne's pending post-trial motion to vacate the judgment of conviction and the opposition of the United States to that motion are printed at pages 1946-2051 of Part 3 of the hearing report.

Part 4 of the hearing report contains additional Committee exhibits and all exhibits received during the hearings from the House Managers or Judge Claiborne. House Managers Exhibit 27, Judge Claiborne's 1980 tax return, is also reproduced in an addendum to the hearing report. The 1980 tax return had been completed in pencil and the addendum was prepared in an effort to provide for a clearer copy. The original exhibits used at Judge Claiborne's second trial will be available to Members in the Senate Chamber during the Senate's consideration of the Articles of Impeachment.

As stated above, the Committee heard argument on pretrial motions on September 10 and at the first part of its session on September 15, 1986. The Committee granted all or part of three motions filed by the House. In order to permit the Senate to focus on issues which are in dispute between the parties, the Committee granted motions by the House to accept as substantive evidence certain testimony and exhibits from Judge Claiborne's second trial (Part 1 at 297-388) and admissions by Judge Claiborne at his first and second trials (Part 1 at 389-96). These rulings were stated by the Chairman at the conclusion of the Committee's hearing of September 10, 1986 (Part 1 at 110-11). The Committee also granted, to a substantial extent, a motion by the House to exclude, as irrelevant, evidence of alleged judicial and prosecutorial misconduct (Part 1 at 486-502). The ruling on this motion is set forth by the Chairman at the beginning of the hearing of September 17, 1986 (Part 1 at 689-92). In that ruling the Committee decided to permit, and the Committee subsequently did hear, testimony relating to Judge Claiborne's allegation that government agents had influenced the testimony of witnesses.

The Committee refers to the Senate two other motions filed by the House which the Committee lacked jurisdiction to rule on (Part 1 at 108-10). These are motions that the Senate summarily dispose of the Third Article of Impeachment (Part 1 at 145-68) or, failing that, apply collateral estoppel to specific issues alleged in the First and Second Articles of Impeachment (Part 1 at 169-87). The Committee also heard a motion by the House that the Senate convene as a court of impeachment to consider the House motions for summary disposition and the application of collateral estoppel (Part 1 at 188-89). To the extent that this motion requested the Committee to desist from receiving evidence until the Senate ruled on the summary disposition and collateral estoppel motions, the Committee denied the motion (Part 1 at 109-10). The Committee concluded that it should comply first with the Senate's mandate that it report to it an evidentiary record.

The Committee also considered motions filed by Judge Claiborne. Over the course of its proceedings the Committee acted on Judge Claiborne's motion for discovery and provided to him, from records furnished to the Committee by the district court, several memoranda of interviews by government agents of Joseph and Constance Wright (Part 4 at 2242–47, 2250). It concluded that several of Judge Caliborne's other motions were beyond the jurisdiction of the Committee. These were Judge Claiborne's motions to declare unconstitutional Senate Impeachment Rule XI (Part 1 at 240–43), his motion to dismiss the Articles of Impeachment on the ground that they do not state an impeachable offense (Part 1 at 244–57), and his motion that the Senate designate the standard of proof in an impeachment trial as proof beyond a reasonable doubt (Part 1 at 274–75). The Committee refers these motions to the Senate (Part 1 at 112–14).

At the conclusion of its proceedings, on September 23, the Committee considered a suggestion of Senators Heflin, Warner, and Pressler that it engage the services of an expert to inform the Committee about the legal principles and procedures governing prosecutorial decisions customarily followed by the Internal Revenue Service and the Department of Justice. The Committee refers to the Senate the suggestion by Senators Heflin, Warner, and Pressler that the Senate might benefit from the assistance of an expert. The parties have been directed to file briefs with the Senate, no later than October 1, on the legal issues that are presented by the Articles of Impeachment. These briefs should include a discussion of relevant legal principles in the administration of the internal revenue laws.

The Committee received documentary evidence and heard testimony during seven days of hearings, beginning on September 15 and concluding on September 23, 1986. It heard the testimony of three witnesses who were called by the Managers on behalf of the House of Representatives. These witnesses were Joseph Wright, Constance Wright, and William Wilson. The Committee then heard the testimony of sixteen witnesses who were called by Judge Claiborne. These witnesses were Annette Quintana, Kenneth Swanson, Judy Ahlstrom, Jerry Watson, Charlotte Travaglia, Clyde Maxwell, Lawrence Semenza, Timothy Cory, Edward Kane, Leland Lufty, Herman Greenspun, Donald Skelton, Richard Jesinger, Leo Halper, Barry Lieberman, and Judge Claiborne. The Committee called no witnesses of its own but it did recall one of Judge Claiborne's witnesses, Jerry Watson, for further examination by Members of the Committee.

All witnesses were subject to examination and cross-examination by the Managers, or by their counsel, and by counsel for Judge Claiborne. During the first several days of evidentiary hearings the Members of the Committee submitted in writing to the Chairman, in accordance with Senate Impeachment Rule XIX, questions which they wished to propound to the witnesses. Following a unanimous consent agreement of the Senate on September 17, 1986, which permitted the Chairman to modify this procedure, Members of the Committee propounded oral questions to witnesses.

Charles McC. Mathias, Jr.,
Chairman
Orrin G. Hatch
John W. Warner
Warren B. Rudman
Larry Pressler
Mitch McConnell

Paul S. Sarbanes,
Vice Chairman
Howell Heflin
Dennis DeConcini
David Pryor
Albert Gore, Jr.
Jeff Bingaman

Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials

Rule XI

That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subjected to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

○

[Congressional Record—October 2, 1986—S 14561]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

BRIEFS, MEMORANDA, AND MOTIONS

Mr. THURMOND. Mr. President, the parties to the impeachment—the managers on behalf of the House of Representatives and Judge Claiborne—have filed their briefs with the Secretary of the Senate together with a number of memoranda and motions. The briefs have been filed today pursuant to a directive of the chairman of the Senate Impeachment Trial Committee and a joint letter of the President pro tempore and the majority and minority leaders. The briefs set forth the analysis of the parties of the evidentiary record presented to the committee, and also the analysis by each party of the law which is applicable to these impeachment proceedings.

In addition to their brief, the managers have filed, pursuant to a directive of the Senate Impeachment Trial Committee, a memorandum on the constitutionally required standard for conviction applicable to the four articles of impeachment.

Judge Claiborne has filed today several motions and memoranda in addition to his brief: First, a supplemental motion for full and fair impeachment trial before the entire Senate of the United States, or in the alternative for dismissal; second, supplemental points and authorities re: collateral estoppel and summary disposition of third article of impeachment; third, a motion to postpone the hearing on articles of impeachment until the resolution of the supplemental section 2255 motion by the District Court or the Ninth Circuit Court of Appeals; fourth, the motion referred to in the motion to postpone; and fifth, an application for issuance of subpoenas for full and fair impeachment trial before full Senate.

Judge Claiborne is requesting that the Senate consider these motions at the outset of next week's floor proceedings on the impeachment. Because each of these documents has been filed after the printing of Senate hearing report 99-812, which is a record of the proceedings of the Senate Impeachment Trial Committee, I ask unanimous consent that they be printed at a suitable place in today's Congressional Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

[In the Senate of the United States, Sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Post-Trial Brief of the House of Representatives:

I. ARTICLES I AND II

Articles I and II of the Articles of Impeachment set forth allegations that Judge Claiborne willfully made and subscribed a false statement on his income tax returns for 1979 and 1980. Each Article alleges a violation of § 7206(1) of title 26, United States Code.

Although Judge Claiborne already had been convicted of these two charges in the federal courts, the House of Representatives independently offered proof in support of each Article. In the following sections of this brief, the House of Representatives sets forth the legal standard of "willfulness" as used in § 7206(1), and summarizes the evidence presented by both parties with respect to the 1979 and 1980 tax returns.

A. The Legal Standard of "Willfulness."

The first two Articles of Impeachment allege that Judge Claiborne committed the felony offense proscribed in 26 U.S.C. § 7206(1). Section 7206(1) is violated when an individual "[w]illfully makes and subscribes any [tax] return," under penalties of perjury, "which he does not believe to be true and correct as to every material matter." *United States* v. *Bishop,* 412 U.S. 346, 350 (1973). In *United States* v. *Marabelles,* 724 F.2d 1374, 1380 (9th Cir. 1984), the court defined the elements of § 7206(1) as follows:

> (1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter;
>
> (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury;
>
> (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and
>
> (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

The issue in this case has centered on the element of "willfulness." There has been no dispute that Judge Claiborne's tax returns for 1979 and 1980 were incorrect as to material matters. The 1979 return failed to report $18,740 in taxable income. The 1980 return failed to report $173,933 in taxable income, avoiding payment of over $96,000 in tax. The sole issue has been whether this underreporting of income by Judge Claiborne was willful, as that term is used in § 7206(1), or somehow accidental.

1. Definition of "Willfulness"

The word willfulness, when used in the criminal law, has been defined in many ways. *See United States* v. *Murdock,* 290 U.S. 389, 394 (1933) (listing various articulations of the definition of "willfulness"). Recently, however, the Supreme Court defined with some particularity the meaning of willfulness in § 7206(1). In *United States* v. *Pomponio,* 429 U.S. 10 (1976), the Supreme Court held: "willfulness [in § 7206] simply means a voluntary, intentional violation of a known legal duty." *Id.,* at 12.

In *Pomponio,* the Supreme Court reversed a decision of the Court of Appeals that had held that § 7206 "requires a finding of a bad purpose or evil motive." *See United States* v. *Pomponio,* 528 F.2d 247, 249 (4th Cir. 1975). The Court of Appeals had based its decision on the following paragraph in *United States* v. *Bishop,* 412 U.S. 346, 360 (1973), where the Supreme Court had stated:

> The Court, in fact, has recognized that the word "willfully" in [§ 7206 and other tax] statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," *Murdock,* 290 U.S., at 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies,* 317 U.S., at 498, or knowledge that the taxpayer "should have reported more income than he did." *Sansone,* 380 U.S., at 353.

In its decision in *Pomponio,* the Supreme Court clarified the meaning of this paragraph:

> Our references to other formulations of the standard did not modify the standard set forth in the first sentence of the quoted paragraph. On the contrary, as the other Courts of Appeals that have considered the question have recognized, *willfulness in this context simply means a voluntary, intentional violation of a known legal duty.*

429 U.S. at 12 (emphasis supplied).

Consistent with the standard established in *Pomponio,* the court in *United States* v. *Daniels,* 617 F.2d 146, 148 (5th Cir. 1980) stated that "willfulness is demonstrated by proof of conscious, deliberate, purposeful acts, rather than negligent, unconscious, or mistaken conduct."

2. Proof of Willfulness

While the legal standard of willfulness may be stated readily, courts have recognized that the defined state of mind rarely is proved directly:

> Direct proof of a taxpayer's intent to evade taxes is rarely available. Willfulness may be inferred, however, by the trier of fact from all the facts and circumstances of the attempted understatement of tax.

United States v. *Conforte,* 624 F.2d 869, 875 (9th Cir.), *Cert. denied,* (449 U.S. 1012 (1980) (Harry E. Claiborne, counsel). A crime whose very purpose is to conceal is not often telegraphed with direct proof. Thus, "Congress did not often define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its efforts to do so result in some unexpected limitation." *Spies* v. *United States*, 317 U.S. 492, 499 (1943). The Supreme Court in *Spies* emphasized that willfulness may be inferred from "any conduct, the likely effect of which would be to mislead or to conceal." *Id.*

Many factors have been identified as legitimate and sufficient proof of willfulness under § 7206 and other tax statutes. As summarized recently in *United States* v. *Hughes*, 766 F.2d 875, 877-878 (5th Cir. 1985) (footnotes and citations omitted):

> The government may rely on such circumstantial evidence as "a consistent pattern of understating large amounts of income, coupled with evidence of falsehood, surreptitious cash transactions and inadequate records kept by taxpayer," substantial understatement of taxable income and tax liability for the years in question, the withholding of material information from the taxpayer's bookkeepers by giving them only summary sheets of the records in question, and the expenditure of large amounts of cash that cannot be reconciled with the amount of income reported.

In a case in which Judge Claiborne participated as counsel, the court identified these and other circumstances from which willfulness may be inferred: the "extensive use of currency and cashier's checks to satisfy obligations"; a "pattern of understatement of income in successive years"; the "use of memory, surmise, estimates, or a careless disregard in making of tax returns"; a "taxpayer's effort not to learn what his tax obligations are"; and the "presence of large sums of money in cash not deposited in a bank." *United States* v. *Conforte, supra*, 624 F.2d at 875.

a. *Consistent pattern of underreporting.*

One of the most frequently cited factors tending to show willfulness is "evidence of a consistent pattern of underreporting large amounts of income." *Holland* v. *United States*, 348 U.S. 121, 139 (1954). *See also United States* v. *Daniels, supra*, 617 F.2d at 149 ("[t]he consistency of the taxpayer's practice of understating his income may also establish the essential inference of willful intent"); *United States* v. *Ashfield*, 735 F.2d 101, 105 (3d Cir.), *cert. denied*, 105 S. Ct. 189 (1984) ("repetitious conduct resulting in underpayment of taxes may be sufficient to show willfulness"). It has been held that "a two year pattern of derelictions . . . [is] itself indicative of the willfulness of [the taxpayer's] actions." *United States* v. *Greenlee*, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975). *See also United States* v. *Hughes, supra*, 766 F.2d at 878 (substantial amount of unreported income over two consecutive years).

b. *Magnitude of the error.*

It also has been held that "[t]he magnitude of [the] error . . . itself tends to support a finding of willfulness." *United States* v. *Daniels, supra*, 617 F.2d at 149 (understatement of taxable income by $37,879, $36,855 and $54,258). *See also United States* v. *Ashfield, supra*, 735 F.2d at 105; *United States* v. *Hughes, supra*, 766 F.2d at 878.

c. *Disclosure of summary data only.*

Another factor that has been cited by the courts as evidence of willfulness is "the withholding of material information from the taxpayer's bookkeepers by giving them only summary sheets of the records in question." *United States* v. *Hughes, supra*, 766 F.2d at 878. In *Hughes*, the Court of Appeals affirmed a tax fraud conviction, relying in part on evidence that [t]he person who prepared the Hughes' tax returns for 1978 and 1979 testified that she used only Hughes' summary lists containing income and expense figures, but that no other books or records were made available to her.

In *United States* v. *Garavaglia*, 566 F.2d 1056, 1059 (6th Cir. 1977), the court similarly relied on evidence of the "preparation of returns by an accountant who did not see any underlying records but relied on information furnished by the taxpayers."

d. *Sudden change in accountants.*

A sudden change in accountants also has been cited as evidence of willfulness. In *United States* v. *Nathan*, 536 F.2d 988 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976), the defendant switched accountants after learning that he would incur a substantial tax liability. The defendant contended that he fired his former accountant for cause. The court held that "the jury could well have believed" that the accountant, allegedly discharged for cause, "was fired because of the [taxpayer's] desire to conceal his income." *Id.*, at 990.

e. *Surreptitious cash transactions.*

Many cases have found the presence of large sums of money in cash, not deposited in a bank, to be highly suspicious. *United States* v. *Conforte, supra*, 624 F.2d at 875; *Warring* v. *United States*, 222 F.2d 906, 909 (4th Cir. 1955). In *United States* v. *Garavaglia, supra*, 566 F.2d at 1059, the court noted:

In *United States* v. *Callanan,* 450 F.2d 145, 148 (4th Cir. 1971), the court wrote that a defendant's "failure to record fees he personally received or to deposit them in his office bank account made it virtually impossible for his accountant to include them in his tax returns." A taxpayer who keeps on regular books but relies on his bank records to reflect his income engages in a deceptive practice when he fails to deposit payments from business customers.

f. *Background of the accused.*

The experience and background of the defendant also is a factor that has been noted in sustaining a finding of willfulness. *See United States* v. *Garcia,* 762 F.2d 1222, 1226 (5th Cir.), *cert. denied,* 106 S. Ct. 238 (1985) (defendant had "several years of legal training at the University of Texas Law School, including a course on federal taxation"); *Gaunt* v. *United States,* 184 F.2d 284, 291 (1st Cir. 1950) (defendant was "an intelligent, astute and successful business executive with many years of experience"; jury could very reasonably "wholly discoun[t] his defense that those understatements for the most part were made stupidly or carelessly"); *Escobar* v. *United States,* 388 F.2d. 661, 666 (5th Cir. 1967) (defendant was "a practicing attorney with experience in the tax field"): *United States* v. *MacKenzie,* 777 F.2d 811, 818 (2d Cir. 1985) (defendants each had college degrees in business-related field).

g. *Turning a blind eye.*

As a final factor bearing on willfulness, courts have held that it is proper to instruct a jury that willfulness may be inferred "from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him." *United States* v. *Martin,* 773 F.2d 579, 584 (4th Cir. 1985); *United States* v. *MacKenzie, supra,* 777 F.2d at 818 n.2. "Stated another way, a defendant's knowledge of a fact may be inferred from his willful blindness to the existence of a certain fact or facts." *United States* v. *Martin, supra.*

h. *Reliance on accountant or other expert.*

These are but some of the factors that have been used to supply proof of willfulness. Considering briefly the opposing side of the coin, it is common for a defendant to claim that errors in reporting are not his fault, but rather that of an accountant or other expert. *See, e.g., United States* v. *Daniels, supra,* 617 F.2d at 147 (defendant claimed "he relied upon the accounting system organized by his bookkeeper" and "was too ignorant of accounting practices to realize that the accounting system was inadequate to reflect his true business earnings"); *United States* v. *Garavaglia, supra,* 566 F.2d at 1058 (defendant testified that he "did not understand bookkeeping or taxes"). Judge Claiborne in fact relied on this defense in cases in which he served as counsel. *See United States* v. *Conforte, supra,* 624 F.2d at 876-878.

As stated in *United States* v. *Whyte,* 699 F.2d 375, 379 (7th Cir. 1983) (emphasis supplied):

> It is a valid defense to a charge of filing a false return if a defendant provides full information regarding his taxable income and expenses to an accountant *qualified to prepare federal tax returns,* and that the defendant adopts and files the return as prepared *without having reason to believe it is incorrect.*

There are two essential elements of this defense: "1) full disclosure of all pertinent facts; and 2) good faith reliance on the accountant's advice." *Id.,* at 380. *See also United States* v. *Conforte, supra,* 624 F.2d at 877 ("[e]ssential to the claim of reliance on counsel is a showing that the reliance be in good faith"). It has been held that reliance is not a complete defense, "but only a circumstance indicating good faith which the trier of fact is allowed to consider on the issue of willfulness." *Id.,* at 876; *United States* v. *Crum,* 529 F.2d 1380, 1383 (9th Cir. 1976).

One closing comment on the issue of willfulness warrants mention. Many of the concepts raised in this section, including the notion of reliance, were considered in *United States* v. *Drape,* 668 F.2d 22 (1st Cir. 1982). The defendant in *Drape* was convicted of a violation of § 7206(1). The facts showed that the defendant had gone to an accountant and had learned that he would owe $81,109 in tax on his yearly tax return. At about this time, at his brother-in-law's suggestion, the defendant visited an attorney who "promoted" a number of tax shelters. The attorney stated that the defendant could avoid paying *any* taxes for that year and could in fact claim a refund for taxes paid in prior years if he invested in the tax shelter. On these representations, the defendant signed the papers, some of which were backdated. The defendant ultimately claimed a tax refund for that year of $58,542. He never mentioned his investment in the tax shelter to the original accountant, nor did he tell that accountant that he had filed a tax return with tax savings of over $100,000.

The defendant was convicted of a violation of § 7206(1). On appeal, he contended that the conviction should be set aside. He asserted "that he did not know that the documents which he signed had later been backdated; that he knew nothing about tax shelters and that he relied on [the attorney's] professional advice." *Id.,* at 25.

The Court of Appeals affirmed the conviction. After emphasizing the wide disparity between the taxpayer's earlier estimated tax and the return as filed, the court stated that "[i]t is inconceivable that this raised no questions in appellant's mind." *Id.* The court further emphasized:

"It taxes credulity that appellant, having met [the attorney] for the first time, would sign a succession of legal documents, including a blank promissory note, and agree to pay [the attorney] $30,000 in cash without knowing what he was doing."

Id., at 26. Reliance upon the tax preparer was not justified in the absence of good faith; moreover, "[i]ntent may be established where a taxpayer 'chooses to keep himself uninformed as to the full extent that [the return] is insufficient.' " *Id.* (*quoting Katz* v. *United States,* 321 F.2d 7, 10 (1st Cir. 1963)).

3. Conclusion

With these legal principles established, a determination of willfulness readily may be made in this case. Willfullness has been inferred from the very factors that are present here. The evidence summarized in the following sections firmly establishes that Judge Claiborne's massive understatement of income and evasion of tax was willful.

B. The 1979 Tax Return

Article I alleges that Judge Claiborne willfully and knowingly filed a false income tax return for 1979. On August 19, 1984, a jury found Judge Claiborne guilty of this same charge beyond a reasonable doubt. The testimony and exhibits presented before the Senate establish that the verdict of the jury is proper and supported by overwhelming evidence.

1. Judge Claiborne Engaged In Willful Conduct Designed to Underreport His Income

In 1979, Judge Claiborne received $41,072.93 in ordinary income pursuant to "fee-splitting" arrangements with his two former associates, James Brown and Annette Quintana. "Report Of the Senate Impeachment Trial Committee," Part I (hereinafter "R(I)"), at page 974. The money was paid in fourteen separate checks. R(I) 301-304 (motion granted R(I) 110). Judge Claiborne reported only $22,332.87, or approximately half, of this income on his 1979 income tax return. House Exhibit 15, R(IV) 2102.

The evidence establishes that this significant underreporting of income and evasion of tax resulted from conscious, deliberate and purposeful actions by Judge Claiborne. He engaged in conduct that was designed to result in a significant underreporting of his income.

a. *The cashing of income checks at local casinos.*

For thirty years, Judge Claiborne meticulously deposited every fee check that he received in bank accounts. R(I) 626, 975. He did so "for the very purpose I wanted my books and records to show every penny that came through my office." *Id.* The records of these deposits were sent directly to Judge Claiborne's accountant, Mr. Joseph Wright. R(I) 535.

In 1979, Judge Claiborne began to walk past his own banks to cash his fee checks at local casinos. (R(I) 975-976. He cashed eight of the fourteen checks that he received in 1979, many of which were for amounts of several thousand dollars. R(I) 301-304 (motion granted R(I) 110). According to Judge Claiborne, he did so to receive "pocket money." R(I) 976. In cashing fee checks, Judge Claiborne left no bank record of their receipt, and generated no information for his accountant. *Id.*

b. *The withholding of vital information from Mr. Wright.*

Judge Claiborne never told Mr. Wright that, for the first time in his professional life, he was cashing fee checks. R(I) 535. Indeed, Judge Claiborne never provided Mr. Wright with detailed information concerning the income that he received. R(I) 980. In 1979, Mr. Wright stopped receiving information directly from Judge Claiborne's banks. R(I) 538. Judge Claiborne failed to provide Mr. Wright with copies of the checks that he received, or a detailed list of the amounts and sources of this income. R(I) 980. Judge Claiborne provided no substitute for the detailed information that has been sent directly to Mr. Wright from the bank. *Id.*

c. *The dissemination of conflicting summary information to Mr. Wright.*

In March 1980, Judge Claiborne provided Mr. Wright with information concerning the receipt of legal fee income in 1979. R(I) 538. In a handwritten memorandum, Judge Claiborne sent Mr. Wright a list of his fee earnings, which he described as "taken from my deposits and authentic." House Exhibit 17, R(IV) 2110. Judge Claiborne testified that he compiled this list by selecting deposits from his bank statements that he believed represented the receipt of fee income. R(I) 985–986.

The March 1980 memorandum is significant for at least two reasons. First, the memorandum and Judge Claiborne's testimony with respect to it are fraudulent. Over half of his fee checks in 1979 had been cashed, not deposited. R(I) 301-304 (motion granted R(I) 110). As Judge Claiborne well knew, it would be meaningless to compile information concerning fee income from deposits. R(I) 990. Judge Claiborne's memorandum is evidence that he deliberately sought to mislead Wright by concealing from him the fact that he was cashing fee checks in significant amounts.

It also is significant that Judge Claiborne prepared the March 1980 memorandum from memory. R(I) 985. He claimed that he did not have at that time any records of the fee income that he had received, and he obviously could not rely upon Mr. Wright for the information. *Id.* In preparing the memorandum, Judge Claiborne estimated his fee income as approximately $46,000. House Exhibit 17, R(IV) 2110. He thus demonstrated his familiarity with the fact that, in 1979, he has received over $40,000 in fee income—an amount almost equal to that of his judicial salary. R(I) 990; *see also* R(IV) 2097. This evidence is significant in light of Judge Claiborne's subsequent claim that, at tax time, he repeatedly "forgot" that his fee income was more than $22,332.87. R(I) 998-999, 1004. It may be telling that the March 1980 memorandum was prepared to secure a loan from a bank, R(I) 937; Judge Claiborne's memory is remarkably crisp when it serves his interest.

d. *Judge Claiborne participated directly in the misstatement of income on the tax return.*

As stated above, Judge Claiborne reported only $22,332.87 in fee income on his 1979 tax return. R(IV) 2102. The evidence establishes that Judge Claiborne directly was responsible for the derivation of this incorrect figure.

Joseph Wright testified that, of the seven "deposits" set forth in the March 1980 memorandum, Judge Claiborne specifically designated four items as fees in a subsequent telephone conversation. R(I) 546, 548. The conversation occurred as Mr. Wright was preparing the 1979 tax return in June 1980. R(I) 546. The four items designated as fees totalled $22,332.87. R(I) 548. Judge Claiborne identified the remaining items, which previously has been listed as fees, as interest income, proceeds from a time certificate of deposit (TCD), and proceeds from the sale of an airplane. R(I) 547. This highly incriminating testimony of Joseph Wright is corroborated by Judge Claiborne. It also is consistent with Wright's marginal notations on House Exhibit 17, with other evidence, and with past practice. Moreover, Joseph Wright demonstrated persuasively that he is an unbiased witness.

During his testimony, Judge Claiborne acknowledged that he had a conversation with Mr. Wright concerning the March 1980 memorandum. R(I) 938, 1004-1005. Judge Claiborne testified that he told Mr. Wright of at least one item on the list that was *not* fee income. R(I) 1005. Judge Claiborne further admitted that, with respect to the other items, Mr. Wright had no independent information from which he could identify certain deposits as fees and other deposits as interest or other income. R(I) 1009.

Rather, in 1980, Joseph Wright was dependent on Judge Claiborne for this information. R(I) 985. Wright was not receiving any information from Judge Claiborne's banks. R(I) 538. He had no means of determining that Judge Claiborne cashed and deposited a time certificate of deposit on February 2. R(I) 548. He had no access to information concerning interest income. *Id.* He did not even know that Judge Claiborne owned an airplane. *Id.* The evidence presented at the Senate hearing, and at each of the criminal trials, establishes that Joseph Wright had no way of identifying which deposits on the March 1980 memorandum were fees and which were not. *Id.* In three separate proceedings, Judge Claiborne has presented no evidence to rebut Joseph Wright's testimony that he received this information directly from Judge Claiborne.

Mr. Wright's testimony also is consistent with prior practice. For many years, Judge Claiborne had deposited all fee income, and had told Wright to treat all deposits as income unless otherwise instructed. R(I) 535, 980. During this year, Judge Claiborne occasionally would receive and deposit money that was not fee income. R(I) 541. He would instruct Wright of this fact, and Wright would make a marginal notation to exclude that deposit. *Id.* The analysis of the deposits listed on the March 1980 memorandum was consistent with this practice. *Id.* Mr. Wright testified that Judge Claiborne told him, as he had done before, that certain deposits in fact did not represent fee income and should be excluded from the list. R(I) 546–547.

Joseph Wright is a credible and conscientious witness. He testified candidly that he had no independent recollection of the conversation with Judge Claiborne. R(I) 546. He refused to amplify his testimony by claiming to have a specific recollection of what was a common and ordinary event. Joseph Wright's statements are based upon, and consistent with, his established business practices and the documentary evidence that he had preserved. His testimony is amplified only by the marginal notations that he made recording the information he received from Judge Claiborne, R(IV) 2110, and by the undisputed evidence that, in 1980, Wright had no source of information for the notations other than Judge Claiborne. R(I) 1009.

Joseph Wright testified that Harry Claiborne was a special client and a longstanding friend. R(I) 532, 535. *See also* R(I) 585, 626. He has no reason or motive to lie. He has demonstrated, through his refusal to embellish his testimony, that he has no bias against Judge Claiborne. Joseph Wright did not manufacture the specific disclosures on the March 1980 memorandum from thin air. The information came from Judge Claiborne.

e. *Consistent with his own disclosure of information, Judge Claiborne repeatedly used the $22,332.87 figure.*

Judge Claiborne's direct participation in the calculation of the $22,332.87 figure for legal fee income is corroborated by events immediately preceding the preparation of the 1979 return. In his own hand, R(I) 995, Judge Claiborne prepared a worksheet that set forth "earnings [from] private law practice before judgeship" as $22,332.87. House Exhibit 21, R(IV) 2116. Joseph Wright used this worksheet to complete the 1979 return. R(I) 549. Similarly, in his 1979 Judicial Ethics filing, Judge Claiborne identified "clients" fees while in private practice" as $23,050.76. House Exhibit 16, R(IV) 2108. Judge Claiborne testified that he computed the figure himself by using the $22,332.87 amount and adding a small refund check that he had received. R(I) 1002–1003. Each of these documents *prepared by Judge Claiborne* is consistent with his determination, as relayed to Joseph Wright, that his 1979 fee income consisted of four "deposits" totalling $22,332.87. R(I) 546–548.

Schedule C of Judge Claiborne's 1979 tax return reports legal fee income of $22,332.87. House Exhibit 15, R(IV) 2102. The return was signed by "Harry E. Claiborne." *Id.;* R(IV) 2099. On Monday, June 16, 1980—the day the *completed* return was filed—there is a notation in Mr. Wright's appointment book that Wright "worked on and called Harry Claiborne's return and *he was in later.*" House Exhibit 35, R(IV) 2183. The return stood uncorrected until March 11, 1983, well after the government's investigation of the tax fraud had begun. Claiborne Exhibit 11, R(IV) 2232.

2. The Explanation of the Deficiency Offered by Judge Claiborne is Contorted, Inconsistent With Other Evidence, and Not Worthy of Belief

Judge Claiborne has offered a lengthy and convoluted explanation for the significant underreporting of income and evasion of tax on the 1979 return. His vigorous protestations of innocence are not worthy of belief. Indeed, the evidence reveals that Judge Claiborne's testimony has been totally self-serving, largely manufactured, and simply false. The Senate must recognize and appreciate that it cannot accept blindly the statements that are offered. Judge Claiborne asks the Senate to believe too much, to accept too many coincidences, and to ignore too many mistakes. A jury properly rejected this proffered explanation at trial; it is entitled to no more credence in the United States Senate.

The unpersuasiveness of Judge Claiborne's explanation is demonstrated best by revealing its many and varied components. Judge Claiborne would have the Senate believe and accept each of the following propositions:

—that Judge Claiborne started cashing fee checks in 1979 simply to obtain "pocket money." R(I) 976. The evidence reveals that, in 1979 and 1980, Judge Claiborne cashed fee checks as large as $37,500, and totaling over $50,000. R(I) 301–304 (motion granted R(I) 110). This is hardly "pocket money," even in Las Vegas. Judge Claiborne also testified that he deposited some of the money in his bank account, *after* he cashed the check at a casino. R(I) 977. The logical inference from this bizarre behavior is that Judge Claiborne first cashed the items at a casino to avoid a record of its receipt.

—that, despite its claim to be "authentic," Judge Claiborne had no idea that Joseph Wright would use the March 1980 memorandum for income tax purposes. R(I) 992-993; *see* House Exhibit 17, R(IV) 2110.

—that, out of the blue, Judge Claiborne received a telephone call from Mr. Wright, who in essence was "mulling over" the items listed in the March 1980 memorandum. R(I) 938, 1005. According to Judge Claiborne, Mr. Wright initiated a conversation concerning a February 2, 1979 deposit of $20,622.17, despite the fact that Wright had no independent information that could cause him to question it. R(I) 1005, 1009. Mr. Wright purportedly asked Judge Claiborne to re-examine the deposit. R(I) 938, 1005. Judge Claiborne testified that he did so, and later called Wright to tell him that at least a portion of the deposit consisted of the proceeds of a time certificate of deposit (TCD). R(I) 1005. Thus, Judge Claiborne attempted to provide an explanation for Wright's notation to that effect on the March 1980 memorandum. The House of Representatives presented evidence, however, that the February 2 deposit in fact consisted of three items: a fee check for $17,500, a fee check for $84.30, and a Treasury check for $3,037.87. House Exhibit 42, R(IV) 2208; *see also* testimony at R(I) 1006-1007. *The deposit had nothing to do with a $10,000 TCD.* Judge Claiborne's purported explanation is fraudulent. Significantly, Judge Claiborne did not even attempt to offer an explanation for the other notations made by Mr. Wright on the March 1980 memorandum. R(I) 938.

—that, when he prepared the March 1980 memorandum, Judge Claiborne had "misplaced" the slips of paper on which he had recorded his legal fee income, and thus had to "estimate" from his "bank statements." R(I) 985. Since he had *cashed* over *half* of his fee checks, this attempted explanation of the March 1980 memorandum again is fraudulent. Had Judge Claiborne merely lost the information, he readily could have called his two former associates who paid him the money. R(I) 987. It is more likely that the March 1980 memorandum is inaccurate because Claiborne attempted to compile the total only from bank deposits. *Id.* It is a convenient coincidence that, on April 11, 1980, when Judge Claiborne allegedly sent Wright, a letter identifying the sum of his fee income, Claiborne suddenly discovered the slips. R(I) 990-991. Judge Claiborne has possession of accurate information only when it suits him.

—that Judge Claiborne sent Mr. Wright the correct total of his fee income in an April 11 letter, despite the fact that Wright neither solicited nor needed the information at that time. R(I) 932. In fact Wright was operating on the assumption that he had received the correct figure in the March 1980 memorandum. R(I) 545. Wright already had computed Judge Claiborne's estimated tax by using the $46,371 figure in that document. *Id.; see* House Exhibit 19, R(IV) 2114. Wright's diary reflects that he prepared the estimate April 8. House Exhibit 35, R(IV) 2175. It also is significant that, over a month *after* the April 11 letter supposedly was sent, Wright continued to use the figure in the March 1980 memorandum in letters that he wrote to two mortgage companies. House Exhibits 18(B) and 18(C), 2112-2113; *see also* testimony at R(I) 546.

—that on May 1, 1980, 19 days after Judge Claiborne allegedly found the slips of paper, added them to derive an income figure of $41,072.93, and sent that information to Mr. Wright, Judge Claiborne accepted from Wright a figure for legal fees that was only $22,332.87. R(I) 991, 998. Judge Claiborne apparently simply "forgot" almost half of his legal fee income during those 19 days. R(I) 999. Not only was the $22,332.87 figure grossly inconsistent with the April 11 figure that Claiborne purportedly had computed personally and retained in his files, it was widely disparate from the $46,371.93 figure that Judge Claiborne had prepared and sent to Wright in March 1980.

—that Judge Claiborne signed a blank tax return around May 2, 1980. R(I) 929, 999-1000. Wright's diary reveals, however, that Wright *left on vacation* on May 2. House Exhibit 35, R(IV) 2180. Moreover, the diary reflects that Judge Claiborne went to Mr. Wright's office on June 16, *the date the completed return was filed. Id.*, R(IV) 2183. Wright denied that Claiborne had signed the 1979 return in blank. R(I) 564-565. Ken Swanson, an employee in Wright's office, testified that Wright earlier had discontinued the practice of accepting returns signed in blank. R(I) 667, 670. Judge Claiborne, when confronted with the evidence that Joseph Wright had left on vacation May 2, changed his earlier testimony that he had gone to Wright's office in the evening and claimed instead that he had gone there at lunch. *Compare* R(I) 1000-1001, with R(I) 1002. Judge Claiborne's self-serving and inconsistent trestimony should be disregarded.

—that on May 15, 1980, Judge Claiborne "mistakenly" used the $22,332.87 figure from the tax worksheets on his 1979 Judicial Ethics filing. R(I) 1002-1003. No reasonable explanation has been offered, however, as to why Claiborne would use the tax worksheets, which have virtually nothing in common with the ethics filing, rather than his own financial diary or the copy of the purported April 11 letter that allegedly was in his files. Compare House Exhibits 15 and 16, R(IV) 2098-2109. Again, it is unpersuasive that Judge Claiborne simply would "forget" the substantially greater figure that he actually received in 1979, that he had estimated in March 1980 memorandum, and that he allegedly computed and used in the April 11 letter.

—that he never reviewed the 1979 tax return, despite the fact that, according to his testimony, he had signed it in blank before it was prepared. R(I) 1017.

Judge Claiborne's explanation simply requires too much to be believed. It is inconsistent with the sworn testimony of other witnesses, it is internally inconsistent, and it is contrary to the documentary evidence. Most importantly, virtually every facet of his explanation is contrary to common sense. It is an unpersuasive attempt to reconcile the incriminating evidence revealed in his tax return, tax worksheets, and that other documents found in his accountant's files. Judge Claiborne was a sophisticated lawyer, businessman and judge; he is an equally sophisticated witness. The substance of his testimony, however, does not withstand reasoned scrutiny.

3. The April 11 Letter

Since the defense relies so heavily on the April 11 letter, it is useful to consider separately the problems with this evidence. While the House of Representatives disputes the authenticity of the letter, the existence or non-existence of this letter is not determinative.

There are many reasons to doubt that Judge Claiborne ever prepared and sent the April 11 letter, in which he purportedly disclosed the total amount of his legal fee income. Judge Claiborne acknowledges that Joseph Wright had not requested this information. R(I) 932, 992. The primary purpose of the April 11 communication was to deliver a check to Wright in connection with an application for an extension of time. R(I) 933. Mr. Wright already had determined the amount of the check, preparing an estimate of Judge Claiborne's tax liability from W-2 data and the March 1980 memorandum. R(I) 932, 992; House Exhibits 19–20, R(IV) 2114–2115. Joseph Wright testified that the estimate was prepared on April 8, 1980; a notation from his appointment book for that date reveals that he "worked on Harry Claiborne's data and talked to Judy his secretary and got W-2 data from her and figured approximate tax." R(I) 544; House Exhibit 35, R(IV) 2175. The worksheet used to prepare the estimate records legal fee income of $46,371.93, which is the amount Judge Claiborne disclosed in his March 1980 memorandum. R(I) 545; House Exhibits 17 and 19, R(IV) 2110 and 2114. Thus, the information with respect to legal fee income in the April 11 letter neither was solicited nor needed at that time.

It also is significant that the April 11 letter, which purportedly sets forth a new total for legal fee income, makes no reference to the March 1980 memorandum. See House Exhibit 36, R(IV) 2185. That earlier memorandum had claimed to be "authentic." See Exhibit 17, R(IV) 2110. The April 11 letter simply disregards that document and sets forth a new bald total for legal fee income, without any of the detail provided in prior years through bank statements or proffered in the March 1980 memorandum.

Both Joseph and Constance Wright testified that they had not seen the April 11 letter before it was shown to them by Defense Counsel Oscar Goodman in late 1983. R(I) 550–551, 586. Moreover, the original of that letter was not found in Mr. Wright's file, unlike *each* of the other documents that have been identified as prepared in connection with Judge Claiborne's 1979 tax return. R(I) 551, 586; other documents R(I) 540, 542, 543, 549. While the defense has made every effort to suggest that the April 11 letter was lost or destroyed—going so far as to imply that the FBI broke into Mr. Wright's office on three occasions and surgically removed this single document from the file—there is no actual evidence that this document in fact was lost. Nor has any explanation been offered as to why both Joseph and Constance Wright would lie to cover up such a loss. Indeed, Constance Wright testified forcefully that she searched thoroughly for the document in hopes that she would *find* it, to help someone who had been a favorite and special client. R(I) 585–586. Unlike all of the other documents properly maintained in Mr. Wright's file, that document was not found.

Judy Ahlstrom's testimony that she delivered and now remembers the contents of the letter is not credible. Ms. Ahlstrom did not write or type the letter; it was handwritten by Judge Claiborne. R(I) 699. The letter did not require her review. *See* House Exhibit 36, R(IV) 2185. Ms. Ahlstrom did not see the letter for over three years, until after the indictment was returned. R(I) 683. At that time, she did not retrieve the letter from the file; it was shown to her by Judge Claiborne and Oscar Goodman. R(I) 683–684. She had no reason to remember the contents of the letter.

Ms. Ahlstrom's testimony at the hearing also was impeached repeatedly with prior sworn testimony. At the hearing, Ms. Ahlstrom claimed that she had read the April 11 letter "carefully" and "in detail." R(I) 680, 681. At Judge Claiborne's first trial, she testified that she "didn't read it in great detail," that she "didn't care what was in it," and that she "just skimmed it because [she] was copying it and waiting for other things to be copied." R(I) 681. At the hearing, when asked whether she typically read Judge Claiborne's personal mail, Ms. Ahlstrom testified, "as a general proposition, if it was given to me, I did." *Id.* When asked this same question at Judge Claiborne's first criminal trial, her answer had been, "not as a general rule, no." R(I) 682. Similarly, Ms. Ahlstrom testified at the hearing that she remembered "the majority" of the contents of the letter. R(I) 684. At Judge Claiborne's second trial, she testified quite differently: "If you had asked me to tell you, read it to you or tell you what was in it, I could not have told you." R(I) 685.

In sum, Ms. Ahlstrom's testimony concerning the April 11 letter has been incredible and inconsistent. At the hearing, she acknowledged that she has a personal stake in the outcome of these proceedings. Her position on the federal payroll is dependent upon Judge Claiborne's return to office. R(I) 695.

The House of Representatives has not disputed that someone, and in all probability Ms. Ahlstrom, delivered an envelope containing an $8,000 check to Mr. Wright's office on April 11, 1980. Ms. Ahlstrom well may remember that she delivered something to Mr. Wright's office on that day; she strains her credibility by claiming to remember the precise contents of any letter that was included. Similarly, the recent affidavit submitted by Ellen Arthur, a witness who suddenly has surfaced after more than six years, does not establish that Judge Claiborne wrote or delivered the April 11 letter. Ms. Arthur purports to have received an envelope that Ms. Ahlstrom delivered to Mr. Wright's office. R(I) 1142. Ms. Ahlstrom, on the other hand, testified that she is certain she delivered the envelope to Mrs. Wright. R(I) 677, 698. In any event, Ms. Arthur does not claim to have seen the contents of the envelope. *See* R(I), 1142–1143.

Proof of willfulness in 1979 does not depend upon the delivery or nondelivery of the April 11 letter. The evidence that Judge Claiborne *analyzed* the information in the March 1980 memorandum, that he *told* Joseph Wright that his fee income was $22,332.87, that he *recorded* that amount on his tax worksheets, that he *used* that amount in filing his Judicial Ethics statement, and that he *endorsed*—or failed for three years to correct—a tax return using the $22,332.87 figure, conclusively demonstrates that Judge Claiborne personally is responsible for the underreporting of income and the evasion of taxes on his 1979 tax return. The possible disclosure of an unsolicited, unneeded and summary statement of income in a letter purportedly sent to accompany a tax payment check does not undermine this evidence. *See United States* v. *Hughes, supra,* 766 F.2d at 878 (willfulness inferred from the withholding of material information from an accountant by providing only summary sheets); *United States* v. *Garavaglia, supra,* 566 F.2d at 1059 (same).

4. Conclusion

The evidence establishes that Judge Claiborne willfully made and subscribed a tax return in 1979, under penalties of perjury, that he did not believe to be true and correct as to every material matter. Ample evidence is present from which willfulness must be inferred.

Direct "evidence of falsehood" is present. *United States* v. *Hughes, supra,* 766 F.2d at 877. Judge Claiborne sent his accountant a memorandum that fraudulently sought to identify fee income from bank deposits. In addition, Judge Claiborne told Joseph Wright, in analyzing the "deposits" in the March 1980 memorandum, that his fee income in 1979 was $22,332.87, or *half* of the correct amount.

Judge Claiborne engaged in an extensive practice of "surreptitious cash transactions." *Id.* He cashed over half of the fee checks that he received. His failure "to deposit them in his bank account made it virtually impossible for his accountant to include them in his tax returns." *United States* v. *Callanan,* 450 F.2d 145, 148 (4th Cir. 1971).

Judge Claiborne withheld material information from Mr. Wright "by giving [him] only summary sheets of the records in question." *United States* v. *Hughes, supra,* 766 F.2d at 878. Moreover, by repeatedly using the incorrect figure for his legal fee income—when verifiable information readily was available to him—Judge Claiborne at best "deliberately closed his eyes to what would otherwise have been obvious to him." *United States* v. *Martin, supra,* 773 F.2d at 584.

Each of these facts provides a legitimate inference of willfulness. Coupled with the overwhelming evidence of Judge Claiborne's massive understatement of income in 1980 and subsequent years, the Senate must find that Judge Claiborne's actions were willful.

The *same* evidence that has been presented to the Senate was heard by a jury in Judge Claiborne's criminal trial. That jury weighted this evidence, evaluated the credibility of these same witnesses, and found beyond any reasonable doubt that Judge Claiborne willfully had underreported his income in 1979. Both the trial judge and the Court of Appeals found as a matter of law that the evidence was sufficient to sustain that verdict. Nothing has been presented that should cause the Senate to differ from the reasoned verdict of the jury and the considered judgment of the Judicial Branch of our government.

C. The 1980 Tax Return

Article II alleges that Judge Claiborne willfully and knowingly filed a false income tax return for 1980. On August 10, 1984, a jury found Judge Claiborne guilty of this same charge beyond a reasonable doubt. The testimony and exhibits presented before the Senate establish that the verdict of the jury is proper and supported by overwhelming evidence.

1. The Evidence Proves That Judge Claiborne Engaged In Willful Conduct Designed To Underreport His Income

The evidence forcefully establishes that Judge Claiborne willfully underreported a massive amount of his income in 1980. In that year, two significant tax events occurred. First, Judge Claiborne received a substantial amount of fee income from his law practice. He received four checks that totalled $87,912—an amount far greater than his judicial salary of $54,499.92. R(I) 306-307 (motion granted R(I) 110). Second, Judge Claiborne sold his home for a considerable gain, and reinvested only a small portion of that money in a new dwelling. R(I) 1019. Specifically, he sold his home, which has an adjusted basis of $362,800, for $725,000 and reinvested only $285,000 in a new home. See House Exhibit 37, R(IV) 2192. Discounting commissions and expenses of sale, Judge Claiborne realized a gain on the transaction of $314,812. *Id.* Taking into account an appropriate exclusion of $100,000, Judge Claiborne incurred a taxable gain of $214,812. *Id.*

Judge Claiborne was acutely aware of the significance of these tax events. He specifically had been advised that he would have to pay a substantial amount of tax because of the real estate transaction. R(I) 742, 778. This "concerned" him, R(I) 742, and he turned to Mr. Watson, the man who prepared the 1980 return. R(I) 778. Moreover, Judge Claiborne had estimated, in an application for an extension of time, that his tax liability would be $42,847.96. House Exhibit 32, R(IV) 2151. Judge Claiborne likely prepared the estimate himself. It was signed by him and not by any tax preparer. *Id.* Mr. Watson believed that his office had not prepared it. R(I) 746. Finally, Watson did not credit the corresponding tax payment on the 1980 return. House Exhibit 27, R(IV) 2134. To be blunt, Judge Claiborne had major tax problems in 1980 and he knew it. R(I) 1019.

It is in this context that Judge Claiborne rejected the services of his accountant for the preceding thirty years, Joseph Wright. Mr. Wright called Judge Claiborne five or six times in 1981, expecting fully that he would prepare the judge's 1980 tax return. R(I) 551, 693. Judge Claiborne did not even return those calls. R(I) 1018. Instead, the judge retained Jerry Watson, with the displayed firm name, "Creative Tax Planning." R(I) 737. Judge Claiborne made no attempt to determine Mr. Watson's qualifications or experience, R(I) 1021, and retained him despite what appears to be an unfavorable community reputation. R(I) 799, 811. Watson in fact has only a high school education. R(I) 704. Judge Claiborne, an exceptional trial lawyer, a successful businessman, R(I) 971-972, and educated judge, allegedly hired Mr. Watson because the judge was "impressed" with the way that Watson "handled a telephone call." R(I) 939-940, 1020.

In the months preceding the filing of Judge Claiborne's 1980 return, the judge and Mr. Watson had extensive discussions concerning the two significant tax events that had occurred in 1980. The initial discussions centered around the sale of Judge Claiborne's home and the significant tax liability that the judge had been told to expect. R(I) 707, 726, 742, 778, 1023. Mr. Watson told Judge Claiborne that he believed he could do something about that tax liability. R(I) 742. In addition, in a letter to the judge sent well before the return was filed, Watson stated that "on your home we should be able to work up a figure that would cause that transaction to be tax free." House Exhibit 31, R(IV) 2149. This advice was completely at odds with the advice that Judge Claiborne earlier had received from others. R(I) 742, 778. Significantly, it was after he received the letter that Judge Claiborne retained Watson to prepare his tax return. R(I) 757, 1165.

The judge and Mr. Watson also discussed extensively a proposal in which Judge Claiborne would declare a "loss" from the termination of his law practice in 1978. R(I) 723-724, 726-728, 1023-1024. Judge Claiborne had not purchased his practice. It had no cost basis. On his 1978 tax return, Judge Claiborne had depreciated and recovered completely the cost of his library, his fixed equipment, and his leasehold improvements. House Exhibit 34, R(IV) 2155. Nevertheless, Judge Claiborne and Mr.

Watson decided to take a loss in 1980 from the termination of the law practice. Mr. Watson testified that the two men had "several" discussions about this topic. R(I) 723-724, 726-728. Judge Claiborne acknowledged one conversation of between 30 and 45 minutes and at least one other conversation. R(I) 1023-1024. During the conversations, the two men discussed supposed fair market values for the law practice as a whole and for specific "elements" of that practice, such as a telephone list and legal briefs. R(I) 766-767, 1062. In the letter sent to Judge Claiborne, Watson confirmed that "the possibility of taking a loss on your business looks good." House Exhibit 31, R(IV) 2149. Again, *after* he received that letter, Judge Claiborne told Watson that he wanted Watson to prepare the 1980 return. R(I) 757, 1165.

The entire purpose of the scheme to declare a loss from the practice was to subtract Judge Claiborne's legal fee income from the amount of the declared loss. R(I) 1063. Since only $3,000 of a long term loss may be utilized as a deduction against ordinary income in any tax year, the actual tax consequence of the loss itself was negligible. R(I) 723. However, Mr. Watson used the loss as a base against which he surreptitiously offset Judge Claiborne's receipt of ordinary income. R(I) 719-720, 722, 730-733. The approach Watson utilized is false, both factually and legally. First, Watson reported on Schedule D that a transaction had occurred with respect to assets acquired in 1978 and sold in 1980. *See* House Exhibit 27, R(IV) 2137. No such transaction had occurred. Second, he listed the cost or other adjusted basis of the property sold as $25,000 a figure he admitted was his estimate of fair market value rather than cost. R(I) 729-730. The estimate was based at least in part on information supplied by Judge Claiborne. R(I) 723. Finally, Watson deducted an artificial sales price of $150,000, which allegedly included the $88,000 ordinary income. R(I) 730-731. From a non-existent sale, Watson created a $100,000 loss. Using this method, Watson eliminated over $87,000 in taxable income in 1980, $40,000 in taxable income in 1981, and a similar amount in 1982—all in addition to the $3,000 loss actually utilized as a deduction. R(I) 1095-1096, 1098.

Neither Judge Claiborne nor Mr. Watson explicitly remembered whether their discussions concerning the business loss included reference to this treatment of ordinary income. Since this treatment was the only meaningful tax consequence resulting from the loss, however, it is difficult to imagine that the discussions did not include this concept. Moreover, it is noteworthy that Mr. Watson "arbitrarily" chose $250,000 as the "cost or other basis" of the practice. R(I) 720, 723. Judge Claiborne testified that he had expected to receive approximately $230,000 in income from his former practice after he took the bench. R(I) 1120. It is an odd "coincidence" that Mr. Watson "arbitrarily" chose a value for the practice that corresponds so perfectly to the income that Judge Claiborne projected. Rather, it is likely that the loss and the income were *intended* to be consumed together, which is precisely what Mr. Watson and Judge Claiborne did over a three year period. R(I) 1095, 1098.

There is further evidence that Judge Claiborne *knew* that his legal fee income would be "written off" in some fashion and not reported as taxable income. After the return was filed, Jerry Watson told a federal grand jury that Judge Claiborne had *not* disclosed to him the $87,912 in legal fees that the judge had received. R(I) 749, 943. Watson told this to Judge Claiborne, who responded: "Jerry, you have just indicted me." R(I) 943, 948. This statement of Judge Claiborne is remarkable. If Judge Claiborne had believed that his fee income was reported openly and properly on the tax return itself, Watson's statement to the grand jury would have had no consequence. Watson's grand jury "blunder" only could have been significant to Judge Claiborne if the judge *knew* that his fee income was not reported on the face of the return and, instead, he was counting on Watson to fill in the gap.

In sum, there is substantial evidence that Judge Claiborne participated in and had direct knowledge of the fraudulent treatment of fee income on his 1980 return.

The return as prepared and filed delivered on each of Mr. Watson's grand promises. On Form 2119 of the 1980 return, Watson determined that the sale of Judge Claiborne's residence resulted in *zero* taxable gain. House Exhibit 27, R(IV) 2139. Through a series of computational "errors," Watson was able to eliminate an actual taxable gain of $214,812. As promised in his letter, Watson indeed was able to "work up a figure" that "would cause that transaction to be tax free." House Exhibit 31, R(IV) 2149. Watson testified that he prepared this portion of the return himself. R(I) 738-739. After consideration of the tax preference for capital gains, this fraudulent tax treatment avoided $85,925 in taxable income. House Exhibit 39, R(IV) 2200.

Similarly, the 1980 return reported *zero* legal fee income. House Exhibit 27, R(IV) 2133. The return did not include a "Schedule C," where such income properly should have been reported. R(I) 593. Indeed, the $87,912 figure for legal fee income does not appear anywhere on the return. There is a notation on "Schedule D"—which pertains to capital gains and losses—suggesting that "accounts receivable from private practice" were included within a $150,000 item labeled "gross sales price less expense of sale." House Exhibit 27, R(IV) 2137. This fraudulent tax treatment avoided $87,912 in taxable income. House Exhibit 39, R(IV) 2200.

As a consequence of the treatment of these tax events, Judge Claiborne's 1980 tax return declared a total tax liability of $1,103. House Exhibit 27, R(IV) 2134. In other words, a man who had earned a judicial salary of $54,500, who had received $87,900 in legal fees, and who had realized a taxable gain of $214,000 on the sale of his home, *reported and paid $1,103 in taxes.* Not surprisingly, the return declared that Judge Claiborne was entitled to a refund of $20,927. *Id.* After consideration of estimated tax payments that were not reflected on the return, Judge Claiborne in fact received a check from the United States Treasury for $44,256. House Exhibit 33, R(IV) 2153.

The significance of the fraudulent treatment of Judge Claiborne's sale of his home and his receipt of fee income is summarized in House Exhibit 39. R(IV) 2200. That exhibit was explained by Mr. William Wilson, an independent expert retained by the House of Representatives. R(I) 600–602. Mr. Wilson demonstrated that Judge Claiborne reported only 23.5 percent of his gross income, which translated into 15.8 percent of adjusted gross income. *Id.* Taking into account legitimate deductions and exemptions, Judge Claiborne reported only 5.4 percent of his true taxable income. *Id.* Perhaps most significantly, the $1,103 in tax liability reported by Judge Claiborne was 1.1 percent of the $97,864 that he actually should have paid as income tax for 1980. *Id.*

As a result of Watson's work on the 1980 return, Judge Claiborne paid him a fee of $2,000. R(I) 752. In contrast, Judge Claiborne had paid Mr. Wright $600 a year to do both monthly accounting work and to prepare the annual tax return. R(I) 552. Mr. Watson acknowledged that the amount of his fee was determined in part by the magnitude of the tax savings that he had been able to secure for Judge Claiborne. R(I) 752, 770–771.

In considering the import of these events, it is significant that Judge Claiborne is an educated and sophisticated man. He attended both college and law school. He built a lucrative trial practice out of nothing. R(I) 971–972. He rose to become a federal judge. As a lawyer and as a judge, he participated in numerous cases involving tax and tax-related issues. R(I) 960–969. By his own admission, Judge Claiborne is familiar with basic tax concepts and understands the distinction between ordinary income and capital gains. R(I) 973–974. He had sufficient knowledge and experience to understand the concepts in the 1980 return, which are not complex. R(I) 613, 616, 799.

2. The Explanation of These Events Offered by Judge Claiborne Is Not Worthy of Belief

Judge Claiborne's explanation of the events surrounding his 1980 return is difficult to discern. He has difficulty articulating just what he knew, and what he did not know. He has difficulty identifying when he became aware of certain facts, and when he appreciated their significance. Fundamentally, he has waffled repeatedly between embracing the 1980 return as "logical" tax treatment, and discarding it as an "abomination" visited upon him by an incompetent tax preparer, upon whom he foolishly relied.

In any event, Judge Claiborne's attempted explanation is not worthy of belief. His testimony is inconsistent with other witnesses and evidence, with his prior sworn testimony and, most importantly, with common sense. The Senate must face the reality that Judge Claiborne has not testified truthfully. The proffered explanation was rejected by a jury at trial and should be rejected by the Senate.

It is again useful to identify each of the many and varied components of Judge Claiborne's defense. He would have the Senate believe and accept each of the following propositions:

—that Judge Claiborne discarded Joseph Wright as his accountant because Wright was "cold" and "uninterested" in preparing Judge Claiborne's return. R(I) 939, 1130. The evidence presented at the hearing established, however, that both Joseph and Constance Wright viewed Harry Claiborne as a special client and an honored friend. R(I) 535, 585. Judge Claiborne's assertion that Mr. Wright was not interested in preparing the judge's tax return is belied by the fact that Wright called Claiborne five or six times in anticipation of completing the return. R(I) 551, 693. Indeed, it was Judge Claiborne who never bothered to return those phone calls, R(I) 1018; it was Judge Claiborne who was "cold" or "indifferent" to his old friend. The more logical and appropriate inference from this evidence is that Joseph Wright was discarded because he knew too much (Judge Claiborne already had identified the receipt of $41,000 in 1980 fee income on the March 1980 memorandum, House Exhibit 17, R(IV) 2110) and because Joseph Wright simply was too "exceedingly honest" to create the tax savings that Judge Claiborne sought. R(I) 626.

—that Judge Claiborne had no idea of Mr. Watson's lack of experience and competence. R(I) 1021. Judge Claiborne in fact had ample notice of Mr. Watson's business orientation. The sign "Creative Tax Planning" was displayed on Watson's office door. R(I) 737. The "handyman" nature of his practice was featured on the stationery that Watson used to correspond with the judge and in a brochure the judge admitted he had read. House Exhibit 31, R(IV) 2149; R(I) 1020. There is substantial evidence that Watson's reputation in the community was poor. R(I) 788, 799, 811. Again, the logical and appropriate inference from the record is that Judge Claiborne knowingly selected a tax preparer who would not be encumbered with a valued professional reputation, a full knowledge of the tax law, or personal integrity. Certainly, qualified experts were known by, available to, and passed over by Judge Claiborne. R(I) 1022.

—that Judge Claiborne did not read the completed 1980 return or understand its treatment of the significant tax events that had occurred. This claim is astonishing in light of the fact that Judge Claiborne had never used Watson before that time. Moreover, the claim is belied by the fact that Judge Claiborne had discussed the tax concepts utilized on the return with Mr. Watson prior to its completion, R(I) 723-724, 726-728, 1023-1024, and that Judge Claiborne obviously was familiar with these basic tax concepts. R(I) 973-974. It is inconceivable that, after learning from other accountants that he would incur a substantial tax liability in 1980, and then deliberately choosing Mr. Watson to do the return, Judge Claiborne had no idea that the return reported only $1,103 in total tax. In addition, as explained above, Judge Claiborne's protestations of ignorance are inconsistent with his immediate realization that Watson had "indicted" him by failing to tell the grand jury of the scheme employed on Schedule D.

—that Judge Claiborne realized that "something was wrong" at least three days after the return was filed. In an attempt perhaps to bolster his credibility, Judge Claiborne testified repeatedly that he has the "impression" that "something was wrong" shortly after he filed the 1980 return. R(I) 947, 1031, 1134-1135. This claim is remarkable in light of Judge Claiborne's failure ever to do *anything* to correct or even review the return carefully. R(I)(1031. It also is inconsistent with his acceptance of a refund of $44,256, and with his previous testimony that the tax treatment on the return seemed "logical" to him. R(I) 1179. He also retained Watson for two additional years. R(I) 1134-1135. Again, the normal and appropriate inference is that Judge Claiborne did nothing to change the 1980 return because he was aware of, and endorsed, its contents. He undoubtedly had the "impression" that something was wrong, but that "impression" did not result from a cursory review of the return. The entire return was a fraud that Judge Claiborne had helped to create.

—that Judge Claiborne was "too busy" to notice and correct the gross underreporting of income on the 1980 tax return. R(I) 1110, 1149. This perhaps is Judge Claiborne's most blatantly artificial claim. When asked what he had done with the $44,256 refund that he had received from the government, Judge Claiborne testified that he cashed the check to finance the purchase of quarter horses in Mexico. R(I) 1134. When that transaction fell through, he invested in two apartment houses. *Id.* During this same period, Judge Claiborne bought two separate homes and remodeled one. R(I) 977. A man who has time to investigate quarter horses in Mexico and to invest in real estate certainly has time to read ten pages of a tax return.

Judge Claiborne's purported explanation is not simply beyond belief. It is fraudulent. The House of Representatives respectfully submits that the Senate must face and accept the reality that Judge Claiborne not only has willfully defrauded the government on his tax returns, but has perjured himself in his testimony before the Senate. A jury rejected Judge Claiborne's defense and implicitly found that he had lied under oath. His testimony continues to change from hearing to hearing and, indeed, from day to day. Although he portrays himself as an unsophisticated "country" boy who was duped by two separate tax preparers and hounded by the government, the evidence reveals that Judge Claiborne in fact is a convicted felon who will say whatever he believes is necessary to absolve his guilt.

3. The Significance of Full Disclosure, the Sloppiness of the Return, and the Right to an Audit

Apart from his explanation of the events that led to the filing of the 1980 return, Judge Claiborne raises three additional arguments in support of his claims of innocence. Specifically, he points to the disclosure of $88,500 in fee income on his Judicial Ethics filing for 1980; he contends that the 1980 return was prepared too "sloppily" to be a concerted attempt to defraud the government; and he asserts that he had a right to correct any deficiencies in the return through an audit. None of these arguments warrants his acquittal.

The House of Representatives acknowledges that Judge Claiborne disclosed $88,500 in fee income on the 1980 Judicial Ethics filing. Such disclosure, however, is not inconsistent with Judge Claiborne's treatment of his fee income on the 1980 tax return. In 1980, Judge Claiborne apparently did not seek to withhold information from his accountant, Mr. Watson. He apparently did not *need* to do so; Watson had many "creative" ways to avoid paying taxes. Judge Claiborne allied with Watson in the development of two schemes that reduced his tax liability from $97,864 to $1,103. The defense of reliance upon a tax preparer requires not only full disclosure of all pertinent facts, but also "good faith reliance on the accountant's advice." *United States v. Cox,* 348 F.2d 294, 296 (6th Cir. 1965). Such "good faith" reliance cannot be found in this case.

Similarly, an intent to defraud is not negated by the sloppiness of the return. At the outset, it is disingenuous for Judge Claiborne to assert such a defense; he testified that he never even *read* the return carefully to notice its inartful preparation. R(I) 946. Judge Claiborne testified that he could not say from the copy that he received that the return looked unprofessional. R(I) 1030. Indeed, he supposedly did not notice that it was prepared in pencil until he received a "xerox copy" three days later. R(I) 946. In any event, as Mr. Wilson testified, the return on its face does not necessarily call for an audit. R(I) 606–607. As a fact, no such audit occurred. It is equally plausible that the inartfulness of the return was seized as a "hedge," a ready defense in the event that the fraudulent treatment of tax concepts on the return was challenged.

Finally, Judge Claiborne asserts that he was *entitled* to an audit as a preliminary method of correcting the gross underreporting of income and evasion of taxes on the return. This argument is incorrect as a matter of law. If a taxpayer had a "right" to an audit, there would be no need for criminal sanctions in the tax code. A taxpayer willfully could report anything on his tax returns, correcting only those deficiencies that were detected in an audit. The United States Congress, in enacting § 7206(1) of title 26 of the United States Code, has determined that willfully making a false statement on a tax return is a criminal offense. If there is evidence that a taxpayer willfully acted with the intent to defraud the government, as is present in this case, criminal prosecution is appropriate whether or not steps are taken to correct the *civil* deficiency through an IRS audit.

4. Conclusion

The evidence of willfulness for tax year 1980 is overwhelming. Virtually every factor from which willfulness may be inferred is present.

Judge Claiborne changed accountants in circumstances that are highly suspect. The Senate may infer that Mr. Wright, allegedly discharged for cause, "was fired because of the [taxpayer's] desire to conceal his income." *United States* v. *Nathan, supra,* 536 F.2d at 990.

For a second consecutive year, Judge Claiborne understated his income by a significant amount. "[A] two year pattern of derelictions . . . [is] itself indicative of the willfulness of his actions." *United States* v. *Greenlee, supra,* 517 F.2d at 903.

Again, evidence of surreptitious cash transactions is present. *United States* v. *Hughes, supra,* 766 F.2d at 877. Moreover, Judge Claiborne's repeated claims that he never questioned Watson about his qualifications, that he never read the return, and that he never attempted to understand Watson's treatment of the capital gain and legal fee income is evidence, at a minimum, that Judge Claiborne "deliberately closed his eyes to what would otherwise have been obvious to him." *United States* v. *Martin, supra,* 773 F.2d at 584.

Good faith reliance upon Jerry Watson cannot be found on this record. Watson, a high school graduate, was not "qualified to prepare federal tax returns"; nor can it reasonably be contended that Judge Claiborne could adopt and file the 1980 return "without having reason to believe it is incorrect." *United States* v. *Whyte, supra,* 699 F.2d at 379.

This case is similar in virtually all respects to *United States* v. *Drape, supra,* 668 F.2d 22. Given the wide disparity between the amount of tax that Judge Claiborne had estimated he would pay, and that Watson declared on the return, "[i]t is inconceivable that this raised no questions in [Judge Claiborne's] mind." *Id.,* at 25. "Intent may be established where a taxpayer 'chooses to keep himself uninformed as to the full extent that [the return] is insufficient." *Id.* (*quoting Katz* v. *United States*. 321 F.2d 7, 10 (1st Cir. 1963)).

Based on the same evidence heard by the Senate, a jury found beyond a reasonable doubt that Judge Claiborne willfully underreported his income in 1980. The trial judge and the Court of Appeals again found sufficient evidence as a matter of law to sustain this verdict. Considering the legal standard of willfulness, and the overwhelming evidence in this case, no other conclusion is tenable.

D. Significance of Multiple Years of Underreporting

As explained previously, willfulness may be inferred from "evidence of a consistent pattern of underreporting large amounts of income." *Holland* v. *United States*, 348 U.S. 121, 139 (1954). *See also* cases cited, *supra*, Part I(A)(2)(a). The specific evidence adduced with respect to both 1979 and 1980 is compelling. The *cumulative* effect of the underreporting that occurred in 1979, 1980, and successive years shatters any doubt.

In *United States* v. *Daniels*, 617 F.2d 146 (5th Cir. 1980), the court stated: Proof of "repetitious conduct [is] admissible for the limited purpose of showing the intent of the appellant where, otherwise, it might be claimed that the acts in the tax years were either inadvertent or innocent."

Id. at 149 (citations omitted).

Judge Claiborne failed to report $18,740 in legal fee income in 1979. In the following year, he failed to recognize a $214,812 capital gain, and failed to report $87,912 in legal fee income. In 1981, Judge Claiborne again failed to report $40,000 in legal fee income. *See* Committee Exhibit 7, R(IV) 2064. There is evidence that a similar understatement of income occurred in 1982. R(I) 1098. In sum, there is proof that Judge Claiborne consistently understated his income by massive amounts, until the government's investigation of his tax fraud began.

This repeated understatement of income and evasion of tax cannot be innocent or inadvertent. Judge Claiborne suggests, in essence, that in 1979 he "mistakenly" wrote $22,332 in fee income on his tax worksheets, forgetting the remaining $18,740 that he had received. Claiborne places the entire blame for the error on his accountant, Joseph Wright. In 1980, Judge Claiborne changed accountants. He again suggests, in essence, that he "mistakenly" signed a return that failed to report *any* taxable income from the sale of his home or from his receipt of fee income. The blame this time belongs to a new accountant, using a new scheme. Indeed, the judge "mistakenly" failed to notice that these errors were repeated for two additional years. Judge Claiborne portrays himself as the "innocent beneficiary" of four years of gross errors by two different accountants.

This evidence alone is sufficient to convict Judge Claiborne. When a "bonanza" occurs four times, a taxpayer must know that the decks are stacked. The consistent evidence of underreporting large amounts of income establishes that Judge Claiborne willfully and repeatedly cheated the federal government.

E. Constitutional Issues

In Articles I and II, the House of Representatives alleged that Judge Claiborne's actions were willful. It was evidence of *willful* conduct that justified and mandated Judge Claiborne's criminal convictions. Similarly, it was evidence of *willful* conduct that motivated the House of Representatives unanimously to impeach Judge Claiborne. The House of Representatives set out to prove, and respectfully submits that it has established beyond any doubt, *willful* conduct of Judge Claiborne.

It is the position of the House of Representatives that Judge Claiborne's conviction in the Senate rests upon these allegations of willfulness.

In light of that position, the constitutional issues raised by the first two Articles of Impeachment are readily resolved. The Constitution provides that Judge Claiborne may be impeached and convicted for "High Crimes and Misdemeanors." Article II, Section 4. The willful making or subscribing of a false statement on a tax return is a felony offense under the laws of the United States. The commission of such a felony is a proper basis for Judge Claiborne's impeachment and conviction in the Senate. *See also* Memorandum In Support of Motion For Summary Disposition of Third Article of Impeachment, R(I) 165–167.

II. ARTICLE III

Article III of the Articles of Impeachment alleges that Judge Claiborne should be removed from office because he has been convicted of a felony offense in the federal courts of the United States. The facts in support of this Article are not in dispute.

On August 10, 1984, a jury found Judge Claiborne guilty of two counts of willfully making a false statement on a federal income tax return, in violation of § 7206(1) of title 26, United States Code. The United States Court of Appeals for the Ninth Circuit affirmed the conviction. *United States* v. *Claiborne*, 765 F.d 784 (9th Cir. 1985). The Supreme Court denied a petition for a writ of certiorari. *Claiborne* v. *United States*, 106 S.Ct. 1936. Judge Claiborne presently is in prison.

The preceding sections of this brief demonstrate that Judge Claiborne is guilty of these crimes beyond any doubt. The evidence of guilt is powerful and compelling. That evidence also is significant with respect to Article III. It proves that Judge Claiborne's conviction in the federal courts is justified and proper. The evidence supports the jury's implicit finding, invited by the defense, that Judge Claiborne in his testimony committed perjury. In closing argument, defense counsel admonished the jury that it could not convict Judge Claiborne without finding that he had lied under oath. The jury returned a guilty verdict. After hearing Judge Claiborne and considering his testimony, the Senate is compelled to reach the same conclusion.

Since the Senate heard evidence on the facts underlying Judge Claiborne's conviction, it need not rely on the judicial proceedings to remove him from office. In light of the evidence that has been heard, however, the allegations of Article III assume added significance. An individual who has been convicted of a felony, in a proceeding that was fair and supported by overwhelming evidence, does not deserve to be a federal judge.

Judge Claiborne's judicial proceedings are final. Nothing has been tendered that raises any doubt of that fact. Judge Harry E. Claiborne is, and will remain forever, a convicted felon—a man who cannot legitimately preside over judicial proceedings, who cannot fairly pass judgment on other persons, and who cannot hope to maintain the trust and the respect of the American people.

Much has been heard in this proceeding about honor. The response of an editorial in the Philadelphia Inquirer (Sept. 20, 1986) is clear: "If [Judge Claiborne] had a shred of honor he would have resigned." The Senate has offered full rights and deference to Judge Claiborne. It now must recognize the impact of his multiple convictions for a felony offense.

The House of Representatives submits that judgment is appropriate on Article III. The ultimate issue in any impeachment proceeding is whether there has been a violation of the public trust:

> A well constituted court for the trial of impeachment is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself.

The Federalist No. 65 (Alexander Hamilton), at 477 (Franklin Lib. Ed. 1984).

Through his convictions for a felony offense, Judge Claiborne has violated the public trust. He has earned a mark of infamy, which the evidence proves is sadly but unequivocally deserved. That mark—his felony convictions in a federal court—provides a legitimate and sufficient basis for the Senate to determine that he should never resume the federal bench.

III. ARTICLE IV

Article IV alleges that Judge Claiborne should be removed from office because he has "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary." Judge Claiborne has done so "by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980."

The allegations of Article IV rest on the same evidence adduced in support of Articles I, II and III. The allegations have been proved by overwhelming evidence. Conviction on Article IV rests on a separate legal theory, however, which has roots deeply imbedded in the impeachment power.

As explained in the House Report that accompanied Article IV:

> Article IV makes clear that Judge Claiborne's conviction for falsifying his income tax return for two consecutive years does more than tarnish only his personal reputation as a member of the federal judiciary. The consequence of his illegal and improper actions has brought his court and the entire federal judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice. Such a result renders him unfit to continue to serve on the federal bench.

H. Rep. No. 688, 99th Cong., 2d Sess. 23 (1986). In 1936, the Senate convicted Judge Halsted L. Ritter of this same misconduct.

Judge Claiborne has brought disrepute upon the federal judiciary. In two years, he failed to report over $190,000 in *taxable* income. Judge Claiborne cashed large fee checks at local casinos, and used the tax refund that he received to invest either in quarter horses in Mexico or real estate in Las Vegas. The evidence consistently and persuasively demonstrates that his actions were deliberate, purposeful, and willful. When confronted with his crimes, Judge Claiborne lied under oath. He has refused to resign his office. He has continued to collect his salary while in prison. He has drawn scorn upon himself and the federal judiciary that he represents.

Through these actions, Judge Claiborne has undermined the integrity of the Judicial Branch of government. To restore that integrity, and to maintain public confidence in the administration of justice, Judge Claiborne should be convicted on Article IV.

IV. CONCLUSION

On June 26, 1986, by a vote of 406 to 0, the House of Representatives voted to impeach Judge Harry E. Claiborne on four Articles of Impeachment. In proceedings before the Senate, the House of Representatives presented worthy evidence in support of each Article. On behalf of the people of the United States, and on the basis of the evidence that has been adduced, the House of Representatives respectfully submits that the Senate should convict Judge Claiborne on each of the four Articles of Impeachment and remove him from office.

Respectfully submitted,

U.S. House of Representatives.
Managers of the House of Representatives
Peter W. Rodino, Jr., Robert W. Kastenmeier, Romano L. Mazzoli, William J. Hughes, Dan Glickman.
Hamilton Fish, Jr., Henry J. Hyde, Thomas N. Kindness, Michael DeWine.

Impeachment Trial Staff

Nicholas D. Chabraja, special counsel; David W. DeBruin, associate special counsel.

House Judiciary Committee Staff Participating in Impeachment Trial Preparation

M. Elaine Mielke, general counsel; Alan F. Coffey, Jr., associate counsel; Judith Bailey, counsel; Daniel M. Freeman, counsel; Gary G. Goldberger, counsel; Warren S. Grimes, counsel; Joseph V. Wolfe, counsel; Jonathan R. Yarowsky, counsel.

[In the Senate of the United States Sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Notice of Filing

(To: Ms. Jo-Anne Coe, Secretary of the Senate, United States Senate (S-221 Capitol))

Please take notice that on this 30th day of September, 1986, the United States House of Representatives has filed with the Secretary of the Senate, an original and thirty copies of the following:

Memorandum on the Constitutionally Required Standard for Conviction Applicable to the Four Articles of Impeachment.

Simultaneous with the filing of the above described documents, the same were served on opposing counsel, Oscar B. Goodman, Esquire by federal express, and on The Honorable Howard W. Cannon by messenger.

Managers of the House of Representatives
Peter W. Rodino, Jr., Robert W. Kastenmeier, Romano L. Mazzoli, William J. Hughes, Dan Glickman, Hamilton Fish, Jr., Henry J. Hyde, Thomas N. Kindness, Michael DeWine

Impeachment Trial Staff

Nicholas D. Chabraja, Special Counsel,
David W. DeBruin, Associate Special Counsel.

House Judiciary Committee Staff Participating in Impeachment Trial Preparation

M. Elaine Mielke, *General Counsel;* Alan F. Coffey, Jr., *Associate Counsel;* Judith Bailey, *Counsel;* Daniel M. Freeman, *Counsel;* Gary G. Goldberger, *Counsel;* Warren S. Grimes, *Counsel;* Joseph V. Wolfe, *Counsel;* Jonathan R. Yarowsky, *Counsel.*

[In the Senate of the United States Sitting as a Court of Impeachment]

In re

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, Memorandum on the Constitutionally Required Standard for Conviction Applicable to the Four Articles of Impeachment

The House of Representatives, through its managers and counsel, submits this memorandum to aid the Senate in its construction of the Articles of Impeachment.[1] Specifically, this memorandum addresses whether the Fourth Article's use of the word "misdemeanors" in the "wherefore" clause of that Article pleads a different standard for conviction than is alleged in the other three Articles, where reference made to "high crimes and misdemeanors." *See* Transcript of Proceedings before Senate Impeachement Trial Committee, at 163-64 (September 11, 1986).

The sole impeachment standard for the President, Vice President and all civil officers of the United States, including federal judges, is found in Article II, Section 4 of the Constitution, which provides for removal from office for "treason, bribery or other high crimes and misdemeanors." Because this test is the constitutionally prescribed standard, the Senate is obliged to apply it in reaching a judgment as to whether Judge Claiborne has committed impeachable offenses as alleged. The form or styling of the Articles by the House has *no effect* on the test for conviction by the Senate because under the Constitution, the House is given no power to establish a standard contrary to the prescription found in Article II, Section 4.

Past impeachment proceedings, both in the United States and England, show that the practice of abbreviating the phrase "high crimes and misdemeanors" in the articles is common and has no legal effect on the ultimate test for impeachable offenses. Such treatment is also consistent with judicial practice and procedure.

I. The Exclusive Constitutional Standard for Impeachable Offenses is Set Out in Article II, Section 4 of the Constitution

Article II, Section 4 of the Constitution provides that "[t]he President, Vice President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors." Constitutional history is clear that the Framers intended to include federal judges as civil officers for purposes of the impeachment clause.

The proceedings of the Constitutional Convention show that for a brief period, a dual standard for impeachment was contemplated—one for the removal of the President and one for the removal of federal judges. *See* discussion in House Opposition to Motion to Dismiss, at 5-8. But the Delegates expressly rejected such a scheme, and instead chose to adopt a uniform impeachment standard applicable to the President, Vice President, and all other federal officials, including judges. *Id.* The proceedings likewise demonstrate, and constitutional experts agree, that the "good behavior" requirement for federal judges in Article III was employed to prevent executive tampering with the judiciary, and not to insulate judges from removal when they misbehaved. *Id.*

In short, constitutional history and practice dictate that federal judges be subject to the removal standard exclusively set out in the impeachment clause of Article II of the Constitution.

---

[1] The House of Representatives has addressed the subject at length in its pleading captioned, "Opposition to Motion to Dismiss Articles of Impeachement for Failure to State Impeachable Offenses" (hereinafter "Opposition to Motion to Dismiss").

II. Impeachment Practice Has Long Followed The Convention That Abbreviation Of The "High Crimes and Misdemeanors" Standard Do Not Create a New or Different Test

The impeachment standard of "high crimes and misdemeanors" was taken directly from English parliamentary and judicial practice, and this derivation was explicitly noted at the Constitutional Convention. *See, e.g.,* comments of Benjamin Franklin and Gouverneur Morris, 2 *Records of Federal Convention of 1787* 67-69 (M. Farrand ed. 1911). From the first appearance of the phrase in written records describing the impeachment of the Earl of Suffolk in 1388, it was clear that "high crimes and misdemeanors" was a term of art without roots in ordinary criminal law.[2] The phrase was used to signify the constitutional offense of violating the public trust, and not to describe whether a particular act by an official was a "felony" or "misdemeanor" under the criminal statutes.[3] Because the phrase was considered "all of apiece," abbreviations of the phrase in English impeachment procedings were commonplace and considered interchangeable with the complete set of words describing the constitutional offense. *See* Berger, "Impeachment for 'High Crimes and Misdemeanors,'" 44 *S. Cal. L. Rev.* 395, 403 (1971).

The same practice took root in the American experience with impeachment.[4] In the twentieth century, all four impeachment proceedings involved Articles of Impeachment with abbreviated references to "high crimes and misdemeanors" in the "wherefore" clause of the Articles. The styling of these Articles did not trigger a standard for conviction different from that mandated in Article II of the Constitution.

For example, in the impeachment of Judge Archbald, the "wherefore" clause of two Articles recited that he was guilty of "high crimes and misdemeanors" while the "wherefore" clause of the eight other Articles of Impeachment used the abbreviated formulation of "misdemeanors in office." *House Committee on the Judiciary, Impeachment, Selected Materials,* 93d Cong., 1st Sess. 176-83 (1973). Judge Archbald was convicted on five different Articles (I, III, IV, V and XIII), two of which adverted to "high crimes and misdemeanors" and three which alleged "misdemeanors." *Id.* Similarly, in all the four Articles of Impeachment drawn up against Judge English, the "wherefore" clause stated that Judge English was guilty of a "misdemeanor." *Id.*, at 163-73. In the impeachment of Judge Louderback, all the Articles of Impeachment concluded with the statement that Judge Louderback was guilty of "misdemeanors in office," including the last article which, like Article IV of the instant proceedings, charged him with bringing "scandal and disrepute" onto the court and the administration of justice. *Id.*, at 184-87. Finally, in the most recent impeachment trial involving Judge Halsted Ritter, the "wherefore" clause of the seven articles utilized the following combinations of phrases to refer to the uniform impeachment standard: Articles I, II, IV, and VII alleged "high crimes and misdemeanors"; Articles II and V alleged "high misdemeanors." *Id.*, at 188-202.

As with prior impeachment proceedings, all the Articles in this case are styled with reference to the constitutional offense of breaching the public trust. During the deliberations by the House Judiciary Committee on the text of Article IV, careful attention was drawn to the historical precedent of not limiting impeachment offenses to only that conduct resulting in a conviction for an indictable offense under the criminal law.[5] *Markup of House Resolution 461, Impeachment of Judge Harry E. Claiborne,* 99th Cong., 2d Sess. 59–66 (Comm. Print 1986). As Congressman Kastenmeier made clear, the term "misdemeanor" appearing in the wherefore clause of Article IV was intended to refer to the "constitutional misdemeanor" proscribed by the impeachment clause, and *not* to a criminal offense of a "lesser nature." *Id,* at 59. As such, "misdemeanor" is an unambiguous reference to the standard for conviction found in the "high crimes and misdemeanors" test of Article II of the Constitution.

---

[2] Although "misdemeanors" has appeared as a term of art connected with impeachment proceedings for 600 years, there was no such category of offense in the ordinary criminal law until the mid 1600's. *See* Berger, "Impeachment and 'Good Behavior'", 79 *Yale L. J.* 1475, 1509 (1970).

[3] In a report issued by the House Judiciary Committee following its consideration of the Articles of Impeachment againt President Nixon, careful study was directed to whether the "high crimes and misdemeanors" standard necessarily referred to crimes under the ordinary criminal statutes. The report concluded that while impeachable conduct does not lend itself to "precise definition", it encompasses all "serious offenses against the system of government. It is not controlling whether [they] are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and are thus 'high offenses' in the sense the word was used in English impeachments." *Impeachment of Richard M. Nixon, President of the United States,* H.R. Rep. No. 93-1305, 93d Cong., 2d Sess., 6-7 (1974) (hereinafter *House Judiciary Report on Impeachment of President Nixon).*

[4] Constitutional experts are in agreement about the "indivisibility" of the phrase "high crimes and misdemeanors" as set out in Article II of the Constitution. They note, for instance, that the adjective "high" must be taken to modify both "crimes" and "misdemeanors" in the "high crimes and misdemeanors" formulation. Similarly, the word "crime" or "misdemeanor", even when standing alone in the impeachment context, must necessarily be read to connote "high crimes" or "high misdemeanor." *See* Fenton, "The Scope of the Impeachment Power," 65 *N.W. L. Rev.* 719, 723-30 (1973).

It is finally worth noting that although some respondents, like Judge Ritter, moved to strike the Articles as being "multiplicitous" in form, none challenged the abbreviated variations of the "high crimes and misdemeanors" standard as establishing a standard other than that which the Constitution plainly describes. *See, e.g., Deschler's Precedents,* ch. 14, § 18.12. at 688–89. And neither has respondent in this proceeding.

III. Under the Constitution, the House of Representatives is Granted the Sole Power of Impeachment, which Includes the Drafting of the Articles of Impeachment. But the House of Representatives is not Given the Power to Establish the Standard for Conviction By the Language Contained in the Articles. Variations in the Form or Wording of the Wherefore Clause of the Articles Have No Legal Effect on the Constitutionally Prescribed Test

Under the Constitution, the House of Representatives is given the sole power of impeachment. Article I, Section 2. Over the past 200 years, the House's has exercised that power through the drafting of Articles of Impeachment, which, on the basis of careful deliberations, allege impeachable offenses under the Constitution. The Senate is given the sole constitutional power to pass judgment on whether a federal official should be convicted and removed for impeachable offenses, as alleged in the Articles of Impeachment. Judgment by the Senate should not be affected simply because the form or styling of the "wherefore" clause of Article IV utilizes an abbreviated phrasing of the mandated conviction standard of "high crimes and misdemeanors." In any event, the House of Representatives has not been granted the constitutional authority to establish the standard for conviction in an impeachment proceeding, and the wording of the "wherefore" clause can do nothing to change, subtract or supplement the mandated test set forth in Article II of the Constitution.

Judicial practice has taken an identical approach in treating the sufficiency of legal pleadings where a demand for judgment follows no ironclad form. *See* Rule 8(a)(3) of the Federal Rules of Civil Procedure.[6]

IV. Conclusion

The House of Representatives respectfully submits that the wording of the "wherefore" clause of Article IV establishes no different test for conviction than applies to Articles I, II and III. All Articles of Impeachment must be judged by the Senate on the basis of the prescribed standard found in Article II, Section 4 of the Constitution.

Respectfully submitted,

NICHOLAS D. CHABRAJA,
Special Counsel.

---

[5] At the time of its adoption of the Articles of Impeachment against President Nixon, the House Judiciary Committee also noted that criminality was not necessarily an "essential ingredient" of the Articles. "The emphasis [in past American impeachments] has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office . . . adverse impact on the system of government." *House Judiciary Report on the Impeachment of President Nixon, Supra,* at 7.

[6] Rule 8(a)(3) of the Federal Rules of Civil Procedure provides that pleading asserting a claim for relief shall contain a demand for judgment for the relief to which the pleader considers himself entitled. However, Rule 8(a)(3) does not require a party to frame his demand for judgment according to a prescribed form; any concise statement making reference to the remedies sought and the parties involved is sufficient. C. Wright and A. Miller, *Federal Practice and Procedure,* ch. 4, § 1255, at 250. The sufficiency of a pleading is tested by the statement of the claim, and the demand for judgment is *not* considered part of the claim. Thus, the selection of an improper remedy in the demand or variations in the phrasing of the relief sought will not be fatal to a party's claim if the statement of his claim indicates that he is entitled to relief." *Id.,* at 252. *See also* East Girard Savings Ass'n. v. Citizens National Bank and Trust Co., 593 F.2d 598 (5th Cir. 1979); Mays v. Scranton City Police Dept., 87 F.R.D. 310,313 (C.D. Pa. 1979).

[In the Senate of the United States sitting as a court of impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Notice of Filing

(To: Ms. Jo-Anne L. Coe, Secretary of the United States Senate, S-221,The Capitol, Washington, D.C. 20510)

Please take notice that on this 1st day of October, 1986, the Honorable Harry E. Claiborne, Respondent, will deliver to BYRON HOOVER, the below-listed documents to be hand delivered by him on the 2nd day of October, 1986 to the Clerk of the Committee on Rules and Administration of the United States Senate and also to the United States House or Representatives through its Special Counsel, Nicholas D. Chabraja:

1. Post Evidentiary Hearing Brief;
2. Supplemental Motion for Full and Fair Impeachment Trial Before the Entire Senate of the United States, or in the Alternative Dismissal;
3. Supplemental Points and Authorities Re: Collateral Estoppel and Summary Disposition of Third Article of Impeachment;
4. Motion to Postpone the Hearing on Articles of Impeachment until the Resolution of the Supplemental Section 2255 Motion by the District Court or the Ninth Circuit Court of Appeals;
5. Amended and Supplementary Motion to (1) Vacate Sentence; (2) For Evidentiary Hearing; (3) For Discovery Proceedings; and (4) For New Trial, and
6. Application for Issuance of Subpoenas for Full and Fair Impeachment Trial Before Full Senate.

Respectfully Submitted:

HARRY E. CLAIBORNE.

(By Oscar B. Goodman, Esq. and Honorable Howard W. Cannon, Attorneys for Respondent.)

[In the Senate of the United States sitting as a court of impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, Post Evidentiary Hearing Brief

(By Oscar B. Goodman, Howard W. Cannon, Attorneys for Respondent)

October 2, 1986.

At issue is whether or not Harry E. Claiborne, as the taxpayer, has committed a willful and knowing violation of the tax laws.

SENATOR. To ask one additional follow-up, your Article IV says that "Judge Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980. . . . If we were to determine that he not willfully and knowingly, or at least that was not proven, but he did so with gross negligence, he prepared his 1979 and 1980 tax returns in a grossly negligent manner which in our own view, the Senate's view, constituted misconduct that should justify removal from office, in your view would that kind of expansion of Article IV be legal?

HOUSE MANAGER'S COUNSEL. I do not think it is fair; no I do not think so. And I think we would have to have brought an additional Article. (Part 1, p. 102).

CHAIRMAN. In the fourth article . . . are you contemplating that there would be a lower level of intent necessary to be proved under the fourth article?

HOUSE MANAGER'S COUNSEL. That is not our contemplation and that is not the fashion of the allegations. (Part 1, p. 101).

The Supreme Court has held that willfulness means the "voluntary, intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10 (1976).

Willful activity connotes "bad purpose." United States v. Murdock, 290 U.S. 389, 394-395 (1933); Spies v. United States, 317 U.S. 492 (1943). "Willful" has also been construed to mean an act done with specific intent to violate the law. Screws v. United States, 325 U.S. 91, 101 (1945).

Careless disregard, negligence, even gross negligence, does not amount to willfulness. United States v. Bishop, 412 U.S. 346 (1973).

Willfulness is a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to avoid. United States v. Martel, 199 F.2d 670, 672, (3rd Cir., 1952).

To reach an opinion as to whether a taxpayer acted willfully, the trier of fact must look at all the facts and circumstances surrounding the preparation of the returns in issue.

An instructive case on the issue of willfullness is United States v. Sternstein, 596 F.2d 528 (2nd Cir., 1979). Sternstein was convicted of aiding and assisting in the preparation of income tax returns which were false or fraudulent as to material matters. His conviction was reversed:

After Sternstein was indicted his attorney made a motion for production of exculpatory material. The prosecutor informally showed the defense attorney an I.R.S. investigative report which indicated an " 'exceedingly large number of tax returns' " were examined and taxpayers "interviewed in depth," yet the investigation resulted "in only those comparatively very few returns and taxpayers named in the Indictment." 596 at 529. Sternstein's lawyer argued that the facts in the report supported Sternstein's position that any erroneous deductions entered by Sternstein were the "result of inadvertence and not [of] any intent or purpose to commit the crime alleged."

[As was the case in the Claiborne proceedings, counsel sought production of exculpatory material, and in particular the report of the I.R.S. Special Agent. As in Claiborne, the trial judge did not conduct any examination of the Special Agent's report before denying the motion for production.]

At trial the prosecution called taxpayers who had been serviced by Sternstein, who testified that at least one itemized deduction listed as an expense had not been incurred and had not been submitted as an expense to Sternstein. The taxpayers also testified that they paid Sternstein a flat fee and there existed no contingency upon a possible refund. The taxpayers denied reviewing or examining the returns which contained the falsely stated deductions.

The appeal rested on the issue as to whether Sternstein was deprived of due process of law by the court's failure to turn over the I.R.S. report.

The Appellate Court recognized that the critical element in a tax fraud case is the "mental state" of the defendant. 596 F.2d at 530. It noted that the accused, should be permitted "wide latitude in the introduction of evidence which tends to show lack of specific intent." Ibid.

Sternstein's counsel argued that his client innocently entered the deductions in question based upon information supplied to him by his clients. He added that there was no motive to prepare fraudulent returns since his fee was not contingent. The prosecution countered by contending that Sternstein's motive was to have satisfied customers, because of their receiving refunds, return to Sternstein year after year.

The Appellate Court recognized that the I.R.S. memoradum was crucial on the intent issue since it would support Sternstein's contention by demonstrating that he did not have a scheme to generate new business by gaining inflated returns, but rather the overwhelming majority of his clients' returns had been audited and found to be proper.

[A most analogous issue was raised at the Claiborne trial. No court has yet examined the I.R.S. and F.B.I. memorandums which remain under seal, and it was not until the receipt of evidence at the Committee pursuant to Rule XI that any evaluation has been so conducted, however cursory.]

BURDEN OF PROOF

In analyzing the proofs, the standard, it is submitted, to be applied by this Honorable Body, is Proof Beyond a Reasonable Doubt.

In a prior time, when an impeachment was contemplated, Senate leaders expressed this rationale:

The Honorable Sam Ervin, Jr., during August 5 and 6, 1974, preimpeachment hearings, stated unequivocally:

"In a case of this kind, if we are called upon to try an impeachment, I would not hope for conviction on any charge unless I was satisfied beyond a reasonable doubt of the truth of the charges."

The Honorable Strom Thurmond echoed this position when he posited that:

"The penalty of impeachment is severe. It is not a criminal penalty, but I know of no penalty that would be more severe than to remove once again a President from office. And, therefore, I believe the evidence should be beyond a reasonable doubt."

Finally, the Honorable John C. Stennis emphatically contributed that:

"Where any party is charged with an impeachable offense, and is tried by the Senate which is highly important to them, be it a so-called minor official on up to the highest official under our Constitution, then I think the proof required ought to be beyond a reasonable doubt. The Nation is a party, and that requires substantial evidence beyond a reasonable doubt."

PROOFS ADDUCED THUS FAR

It is submitted that the totality of the circumstances surrounding the filing of the 1979 and 1980 returns of Harry E. Claiborne negate the proposition that he knowingly engaged in a willful plan to defraud the Government.

Harry E. Claiborne, 69 years of age, was born in McRae, Arkansas. (Part 1, p. 924). He was educated at Quachita Baptist University in Arkadelphia, Arkansas, for three years, and then went to Cumberland University School of Law in Lebanon, Tennessee, where he graduated in 1941. (Part 1, p. 924). He entered the armed services in 1941, and served until 1945. (Part 1, p. 924). Thereafter he came to Las Vegas, Nevada, where he became a police officer, pending his taking the Nevada bar exam. (Part 1, p. 925). Upon being admitted to the bar, he went into the district attorney's office as an assistant (Part 1, p. 925) where he was employed for three years. (Part 1, p. 925). He resigned in order to run for the Nevada Assembly, where he served one term. (Part 1, p. 925).

Thereafter Harry E. Claiborne engaged in the private practice of law. At first he handled all types of legal matters, and eventually specialized in trial litigation. (Part 1, p. 925). He represented high-profiled clients in high profile cases (Part 1, p. 926) but he did not forget his commitment to those with whom he served in the past, representing many free of charge. (Part 1, p. 926).

Several probative matters were established in the review of Harry E. Claiborne's activities during his thirty years of private law practice:

1. His bookkeeping procedures in the running of his law practice were organized in a manner to provide his bookkeeper and tax preparer, Joseph Wright, with all business and banking records, consistent with operating an enterprise consisting of a secretary and two full-time associates (Part 1, p. 928);
2. His directive to Joseph Wright that if a question arose concerning the treatment of an item to be reported to the Internal Revenue Service it must be "resolved in the favor of the government" (Part 1, pp. 927–928);
3. His lack of concern and indifference to money matters, was exhibited by his retention of a fifty thousand dollar cashier's check in a desk drawer for a period in excess of one year (which was not earning interest) (Part 1, p. 1169); and his storage of one hundred thousand dollars in a safe deposit box at a Las Vegas Casino for several years (which was not earning interest), before it was removed and then deposited in order for a check to be drawn to satisfy a tax obligation (Part 1, p. 1169);
4. His complete reliance on his tax preparer, the fact that he never prepared his own return, (Part 1, p. 1148) or a return for a client; that he had infrequent intercourse with Wright about the content of the returns; that he would on occasion sign his return in blank; and
5. His practice of either referring a client to a criminal law tax specialist, or associating such a practitioner, if he was contacted about defending a tax fraud prosecution (Part 1, p. 1148).

In early 1978 the Las Vegas Federal Judiciary was embroiled in an on-going battle with representatives of the United States Justice Department Organized Crime and Racketeering Strike Force. Harry E. Claiborne was nominated for appointment to the bench in April of 1978, and ultimately sworn in as United States District Judge for the District of Nevada on September 1, 1978. (Part 1, pp. 926–927).

He was assigned the court calendar in Reno, Nevada (Part 1, p. 930); however, he also travelled at the request of the Chief Judge of the Ninth Circuit Court of Appeals to other districts within the Circuit. (Part 1, p. 929).

He continued to utilize the services of Joseph Wright for the sole purpose of tax return preparation, since there was no need for bookkeeping now that he was on the bench and not having to administer a private law practice. (Part 1, p. 927).

In 1979, trusting Wright, as he had during the twenty years of their relationship, he signed a 1978 tax return in blank and sent it to Wright, for completion and filing from the Eastern District of Washington, where he was performing a judicial assignment. (Part 1, p. 928).

Judge Claiborne settled in, disbursing his judicial function with fairness to all litigants who came before him, with a keen sensitivity to their rights as citizens, but with a stern view if he believed the litigant to have abused and taken advantage of societal interests. (Part 1, p. 195). He was a workaholic, spending long and exhausting hours on the bench. (Part 1, p. 844). He was attentive and willing to learn about areas in which he had no particular expertise. He was a student being educated by the experts in particular areas over which he had no special knowledge. (Part 1, pp. 833–834; 913–922). For example in tax cases, he had to learn basic principles, but once taught, was able to write scholarly and innovative opinions. (Part 1, p. 835). His reputation for the highest integrity was unquestioned. (Part 1, pp. 829–845).

While he was performing his judicial duties, he became involved in the conflict which existed prior to his taking the bench that other members of the Nevada judiciary were having with the Strike Force's attorneys and agents. (Part 1, p. 931). Harry E. Claiborne stood in the "ambitious path" they desired to carve (Part 1, p. 930).

The atmosphere between the Executive and the Judiciary in the Las Vegas Community was hostile at the time Judge Claiborne engaged in the preparation of his 1979 tax returns.

On April 4, 1980, then Chief Judge Roger Foley authorized the Federal Marshals to seize from the Las Vegas Offices of the Strike Force, characitures depicting the federal judiciary in a contumaceous manner, referring to Judge Foley as a clown, and pointing insulting and derogatory remarks towards Judge Claiborne. (Part 1, p. 931).

On April 9, 1980, it was reported in the Las Vegas media that the Strike Force selectively leaked secret grand jury material in order to undermine the reputation and career of Judge Clairborne. The headlines blazed "Claiborne Target of Las Vegas Strike Force" (Part 4, p. 2308) and announced that the Judge was being investigated for having engaged an investigator to conduct illegal wiretapping, while Judge Claiborne was a private practitioner.

Characteristically, Judge Claiborne reacted to the Strike Force tactic and stratagem. "[The Strike Force attorneys] are a bunch of crooks, and they know I know it," he angrily asserted. "I'm not going to let them ride roughshod over this community. I'm going to stop them." (Part 4, p. 2312) "Those bastards are out to destroy Nevada and I'm not going to let them do it." (Part 4, p. 2313). Such was the atmosphere in Las Vegas, Nevada, on April 10, 1980.

Joseph Wright called Judge Claiborne on the 10th (Part 1, p. 931). As a result of the call, Judge Claiborne, before going to the Courthouse on the morning of April 11, 1980, hand-wrote a letter to Wright in which he referenced the enclosure of a check payable to the Internal Revenue Service in the amount of $8,000, which was to accompany his application for automatic extension, his W-2 form, and the full and correct amount he received as fees ($41,073.93) during 1979, earned from his private practice before he became a judge. (Part 4, p. 2185). He also wrote the $8,000 check at home (Part 4, p. 2222) and took both letter and check to his office. The Judge asked his secretary, Judy Ahlstrom, to get his W-2 form from a file drawer and deliver it, with the letter and check to Wright's office. (Part 1, p. 932).

Judy Ahlstrom delivered the letter, check and W-2 to Wright's office.[1] (Part 1, pp. 675-680; Part 4, pp. 2077-2082).

Later on April 11, 1980, Wright called Judge Claiborne and said he needed another check for $2,500 (Part 4, p. 2146) to accompany the Judge's estimated return. (Part 4, p. 2147). The Judge complied.

Thereafter, in preparing Judge Claiborne's return, Wright did not utilize the true and accurate income figure theretofore provided him by Harry E. Claiborne. (Part 4, p. 2098). Tragically, he either lost or misplaced it. (Part 4, p. 2077). Unfortunately, at the time the return was prepared, it was completed on a form which the Judge had previously signed in blank, having expected to be out of town performing his judicial function on the due date. (Part 1, pp. 928-989). The return declared lesser figures than that which Judge Claiborne fully disclosed in his April 11, 1980, letter.[2]

---

[1] It is settled that a taxpayer has the right to rely on professional assistance, and the same is a defense in a tax prosecution. The reliance must be bona fide. The taxpayer also may not withhold information from the tax preparer.

During the closing argument of the government prosecutor at Judge Claiborne's second trial, he stated: I submit to you . . . when you think about this you will conclude that the only real issue in the 1979 year is whether Jay Wright got [the April 11, 1980 letter]. That's what it all comes down to, it's very simple." (Part 3, p. 1384.) During the proceedings before the Senate Committee, the House Managers' counsel stated: "* * * there has never been any dispute that I am aware of that on the 11th Judy Ahlstrom went over to the Wrights' office with an envelope." (Part 1, p. 1144). Respondent's counsel reacted: "The first time I hear that there is a concession that she was there and delivered something was today." (Part 1, p. 1146). House Manager's Counsel responded: "We have offered no evidence to the contrary. Absolutely none." (Part 1, p. 1146). Judy Ahlstrom unequivocally stated that she delivered the April 11, 1980, letter. During the Senate proceedings she was perceived as being "* * * a credible, believable witness. * * *."(Part 1, p. 1146).

[2] The taxpayer's signature on a tax return is not conclusive proof of knowledge of its contents. In United States v. Bass, 425 F.2d 161 (7th Cir., 1970), the defendant was charged and convicted of various criminal tax violations. His conviction was reversed on the following set of facts: He was the sole stockholder of an auto financing business. He was a salaried employee but not an officer or director of the corporation. He was charged with receiving preferential dividends from

Continued

The atmosphere of conflict and hostility continued with the Strike Force during 1980 and 1981. (Part 1, p. 833; pp. 929–931). A new foe joined their ranks as well, in the personage of FBI Special Agent in Charge Joseph Yablonsky. (Part 1, pp. 929–931). He was unabashed in his public posture of being anti-Claiborne. (Part 1, p. 840). The Judge's friends and associates were being harassed; they were questioned concerning the Judge's life style; they, too, became targets and victims of the vendetta against Harry E. Claiborne.[3] (Part 1, pp. 921–930).

In February of 1981, Judge Claiborne was introduced to Jerry Watson, by the Judge's former wife. By happenstance, after delivering some documents to Watson, she returned to the automobile, in which the Judge was waiting, and said that her accountant, Watson, wanted to meet him. Upon entering Watson's office, the Judge recognized Watson as being a fellow congregant at the First Southern Baptist Church. (Part 1, p. 939). Judge Claiborne, during the course of this first gathering, overheard Watson speaking to someone on the phone about a tax problem, and the Judge was impressed with his ostensible professionalism. (Part 1, pp. 939–940). Casually, they discussed matters concerning the Judge's sale of his home, and purchase of a new home. They cordially parted.

In April of 1981, Watson wrote to Judge Claiborne (Part 4, p. 2149) and suggested that the Judge provide him with certain information should the Judge desire to retain him to prepare the 1980 tax return.

Thereafter Judge Claiborne provided Watson with a substantial volume of tax material; handwritten notes which set forth intricate financial details, including the amount earned from accounts receivable from monies earned ($88,500) while he was in private practice (Part 4, p. 2223) escrow instructions, sales agreements, trust deeds, a promissory note, contractors' agreements, canceled checks, bills, invoices and his tax returns for the years 1973 through 1979. (Part 1, p. 945). Watson prepared an application for an automatic extension (Part 4, p. 2151), which the Judge signed and sent in with a check in the amount of $20,817.59. (Part 1, pp. 945–946).

Watson spoke to Judge Claiborne sporadically. Watson represented that he had two accountants working for him, "one * * * a CPA * * * and the other * * * a very fine accountant who principally works on large business accounts" (Part 1, p. 942), who would service the Judge, but Watson further promised that he would "personally supervise it [himself]". (Part 1, p. 942). Watson Misrepresentated Himself and His Ability to Perform. (The Judge was not the only Watson victim; other pro-

---

the corporation which were not reported in his income. Further, the corporation deducted these dividends as corporate expenses. Bass claimed, at trial, that he had no knowledge that his income tax return did not reflect the payments made by the corporation in his behalf and that the corporate income was not adjusted appropriately.

As to the charge of personal income tax evasion, Bass alleged that he signed his returns in blank and, therefore, claimed the court erred in charging the jury that if they found from the evidence that the defendant signed his tax return, you may draw the inference and find that the defendant had knowledge of the contents of such return.

On appeal, the government argued that the instruction merely rephrased the statement that appears at the bottom of all tax returns and was proper under the law. The language at the bottom of the return as filed stated:

"I declare under penalties of perjury that I have examined this return (including accompanying schedules and statements) and to the best of my knowledge and belief it is true, correct and complete."

The Appellate Court held that ". . . it cannot be said that the effect of such statement is to attribute knowledge of the contents of the return to the taxpayer on the basis of his signature alone." 425 F.2d at 163. The Circuit Court went on to state that the trial court's instruction created a conclusive presumption and it was in error. (In dictum the decision also distinguished the issue of knowledge, from the issue of willfulness, and recognized both elements had to be proved beyond a reasonable doubt; also it was noted that the government's summary witness testified that certain business expenses of the corporation were improper and charged them to Bass as income because proper substantiation of the transactions did not exist. The Court noted that such testimony was improper because it shifted the burden of proof to Bass to show that the disbursements were ordinary business expenses. Interestingly it was observed that "While the Internal Revenue Code requires adequate documentation, lack of such documentation alone will incur civil liability but not criminal liability." 425 F.2d at 164 (citation omitted)).

[3] It should be noted that the "atmosphere" existing at the time the subject returns were prepared, and at the time Judge Claiborne was providing his tax preparers with the information necessary for their preparation, has never been permitted to be referenced or explored in any proceeding, other than in the limited manner permitted pursuant to the Senate Committee's directive. Therefore, it is submitted, at no time has Judge Claiborne's true "state of mind" ever been before a trier of fact.

fessional and business men were also duped and defrauded by Watson.[4] (Part 1, p. 1090).

Charlotte Travaglia, a Watson employee, worked in preparation of the 1980 return. She had no communication whatsoever with Judge Claiborne. (Part 1, p. 783). She sought advice from Watson concerning the treatment of items on the return. She received no answer. (Part 1, pp. 785–786). She placed the Claiborne work product on Watson's desk and had no further contact with it. A secretary in Watson's office, one Adelle Ferrel, made the decision for a Watson client to come in and sign the return, and Judge Claiborne was called. (Part 1, p. 1054). He went to Watson's during a noon recess and signed the portion next to paper clip on the second page of House Manager Exhibit 27 (purporting to be the 1980 Income Tax Return), (Part 4, p. 2134) which consisted of loose pages. (Part 1, p. 946). The Judge did not register that House Manager Exhibit 27 was in pencil (Part 1, p. 947), and had markings depicting arrows on the Schedule D contained therewith.

Three days later Watson came to the Judge's chambers, with a copy of House Manager's Exhibit 27 and a bill for the preparation of the return. (Part 1, pp. 946–947; p. 1025). It was at this time the Judge first formed an impression that there was something wrong with Schedule D. (Part 1, p. 1025). Then, too, he questioned the amount of the refund. (Part 1, p. 1025). Watson responded authoritatively that he accomplished that in his treatment of the closure of the Judge's law practice which was precipitated as a result of the Judge taking the bench in 1978. (Part 1, pp. 1025–1026). Harry E. Claiborne said "[T]hat is good . . . as long as you can support it." Watson replied: "I can sure support it." And then in a refrain reminiscent of his admonition to give the government the benefit of every doubt, Judge Claiborne stated that all he was concerned about was whether Watson could support it, ". . . because I don't want trouble with the IRS because I got all the trouble with the FBI that I can handle right now." (Part 1, p. 1140).

Around July 24, 1981, Judge Claiborne received a refund check from the I.R.S. for $44,256. (Part 4, p. 2153). He spoke with Watson about it and was assured it was appropriate to cash it, since the " 'extra amount . . . was $20,000 that you paid on your estimate.' " (Part 1, p. 952). the Judge cashed the United States Treasury check at the Golden Nugget Casino. (Part 1, p. 952).

The Judge also insisted that Watson represent that his treatment of the return was consistent with "solid" ". . . accounting principles and regulations of the Revenue Code." (Part 1, pp. 947–948). Watson responded that he had taken the ". . . return to two individuals in the Internal Revenue Office, in whom I have a lot of confidence. One of them works on nothing but audits over a million dollars" and "[b]oth of them have told me that this return is right." (Part 1, pp. 710–711 and 951–952).

On hindsight, it is clear that the "Watson Office" treated the return in an improper manner, and although all witnesses (Harry E. Claiborne, Watson, Travaglia) have testified that the $88,500 figure representing income earned from prior private practice was considered on the return, and fully disclosed to the preparer by Judge Claiborne, the numerical figure does not appear thereon generally, nor specifically in Schedule D, where it was treated. (Part 4, pp. 2137–2138).

It should be noted that the $88,500 figure was specifically disclosed to the Judicial Ethics Committee on May 15, 1981, (HEC–X–1), just one month to the day that the 1980 tax return was signed. (Part 1, p. 1124; Part 4, p. 2220).

---

[4] The reliance defense is not limited to reliance on accountants, lawyers, tax preparers, or other professionals. It is a valid defense for a taxpayer to contend that he is a victim of misplaced reliance on anyone. "For example, suppose a businessman pays for personal expenses with corporate funds. He then gives receipts for the expenses to his secretary, whom he tells to send the bills to the accounting department with instructions that they be charged to his loan account. The secretary misunderstands those instructions and instead tells the accounting department that the bills should be charged to the travel and entertainment account. In such a case, the businessman would be the victim of misplaced reliance on his secretary." Fink, Tax Fraud, Vol. 1 (Mathew Bender, 1985).

In effect, there is a great deal of overlap between a reliance defense and a negligence defense. Both defenses ultimately rest upon the existence of a mistake of fact, either a mistake on the part of the taxpayer or a mistake on the part of some third party on whom the taxpayer relied.

It is clear that mere negligence, carelessness, or even gross negligence, by Judge Claiborne is not sufficient to satisfy the element of willfulness.

"You may find that the defendant had knowledge that his tax returns contained false information if you find beyond a reasonable doubt that the defendant was aware of a high probability that the returns contained false information and that he deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that the returns contained no false information, or if you find that the defendant was simply careless, negligent or grossly negligent." (Part 1, p. 178).

Judge Claiborne's loyalty and attachment to his professional obligations sapped his time and energy, precluding him from carefully and assiduously preparing himself against the onslaughts which have now followed. (Part 1, pp. 1126–1127).

It stands uncontroverted, that anyone who chose to set about to cheat or defraud, would have acted with cunning and guile, and not in the open manner as did Judge Claiborne.

"* * * [H]ow, if you were setting out to intentionally conspire to defraud the government, you could have picked Watson particularly and then have signed a return which has been characterized as 'abominable', 'abysmal', any number of terms here. It strikes me as being just stupid as to be beyond your ability to step that far down. If you were going to conspire * * * you would have picked a slightly smarter man and probably, based on what you have written in these opinions, could have figured out perhaps a more clever way—" (Part 1, pp. 1115–1116).

Judge Claiborne was stalked by the Executive Branch.[5] He was denied his opportunity to ameliorate his tax difficulties. (Part 1, p. 828–829).

Judge Claiborne was not afforded the same elaborate set of safeguards and opportunities available to other citizens whose tax returns have been investigated. Pertinent parts of an excellent treatise are referred to in illustration of the manner and means by which Judge Claiborne was deprived. See, Defending Federal Tax Evasion Cases, 13 Am. Jur. Trials, p. 1 et seq.; set forth substantially verbatim hereinafter:

The initial investigation of an income tax return is usually commenced by a revenue agent, * * * experienced to some degree in investigation, and familiar with auditing procedures and the provisions of tax laws and regulations. If the revenue agent finds evidence of fraud during the course of an audit, the audit procedure is modified. The revenue agent will prepare, unknown to the taxpayer, a special report to his group supervisor. The group supervisor sends the report to the Intelligence Division, which decides whether or not the matter warrants investigation by one of its special agents.

In arriving at his decision, the Chief of the Intelligence Division will consider the facts in connection with the return under investigation, based upon the report of the revenue agent together with the group supervisor's approval of such report, or upon other leads that may have been developed indicative of fraud in the return. If, in his opinion, there appears to be no reason for further investigation of the case, the Audit Division is so advised and the case is closed without further action. If, on the other hand, the Chief of the Intelligence Division decides that further investigation is justified, the case is assigned to a special agent of the Intelligence Division for this purpose. The assignment of a special agent may also occur at an earlier stage in the event that leads supplied to or developed by the Intelligence Division itself have indicated the possibility of fraud.

In any event, if the special agent finds that there is no substance to the suspicions of fraud, he so reports and steps out of the case. But if his examination reveals the probability of fraud, a joint investigation is carried on by the revenue agent and the special agent. In the joint investigation the role of the revenue agent is to gather data establishing that a tax deficiency exists. The special agent is concerned with the issue of fraud and with the development of the facts of the case upon which a decision can be reached whether criminal prosecution of the taxpayer in question should be attempted. The revenue agent makes available to the special agent all results of his prior investigation and works under the special agent's direction and control during the joint investigation.[6]

REVIEW BY INTELLIGENCE DIVISION

After the special agent completes his investigation with the aid of the revenue agent, he must decide whether to recommend criminal action against a taxpayer. The guidelines for this determination leave much to be desired. Obviously he must find a deficiency in tax as well as the ingredients of "willfulness" or "criminal intent." But whether the case should be closed merely with a recommendation that only the civil fraud penalty be imposed (which as a practical matter involves the same two elements), or that criminal tax evasion charges be brought in addition, depends on various factors that are not apparent from published Internal Revenue Service procedures.[7] However, the following basic guidelines seem to be indicated:

---

[5] See, Respondent's Supplemental Motion for Full and Fair Impeachment Trial, paragraph 22, characterizing the unique and unfair treatment afforded Judge Claiborne in all procedures and proceedings wherein he was the "target".

[6] Research Institute of America (hereinafter RIA) Tax Coordinator [paragraph] T-1103; 34 AM JUR 2d, Federal Taxation [paragraph] 9015. See discussion of procedures set out in Revenue Agents Manual, reproduced in United States v. Lipshitz 132 F.Supp 519 (D.N.Y., 1955).

1. Should the special agent conclude that there is but negligence or carelessness on the part of the taxpayer involved (in the light of his mental attributes and experiences) he is likely to close the case without a recommendation for criminal action.
2. If it appears that the taxpayer in the preparation of his return sought and relied upon advice by others whom he had reason to believe were qualified to give such advice, and nothing in the case points to fraudulent conduct on the part of the taxpayer, the special agent might be inclined not to recommend criminal prosecution even though the reliance of the taxpayer resulted in an understatement of his income upon his tax return.

If the Intelligence Division decides not to bring a criminal prosecution against the taxpayer, the case is returned to the Audit Division for determination of civil tax liability. The Intelligence Division may direct the Audit Division to add civil fraud penalties to the tax deficiency. However, if the Intelligence Division decides that the taxpayer should be criminally prosecuted, the case is assigned to the Assistant Regional Counsel-Enforcement.[8]

ASSISTANT REGIONAL COUNSEL-ENFORCEMENT

The Assistant Regional Counsel-Enforcement is a division of the Regional Counsel's Office. On receipt of a case from the Intelligence Division, the Assistant Regional Counsel informs the Washington Enforcement Division of the Chief Counsel's Office, and then assigns the case to a field office attorney for review from a legal standpoint. In reviewing the file, consisting of the revenue agent's report, the special agent's report, and any supporting exhibits, the field office attorney may be assisted by a technical adviser on the staff of the Assistant Regional Commissioner-Enforcement.

The field office attorney may at this time ask the taxpayer if he wants a conference. (Judge Claiborne was afforded None).

At the conclusion of his investigation and consideration of the case, the field attorney reports back to the Assistant Regional Counsel with a recommendation either for or against a criminal prosecution. His recommendation of criminal prosecution will depend on whether, in his opinion, (1) the taxpayer has been guilty of willful tax evasion, or other criminal action, and (2) there is a reasonable likelihood that the taxpayer can be successfully prosecuted in a criminal action.

If the decision made is not to prosecute, the case is sent back to the Audit Division via the Intelligence Division. The Assistant Regional Counsel can make a binding recommendation that civil fraud penalties be imposed. If the Intelligence Division insists on a criminal prosecution despite the Assistant Regional Counsel's contrary conclusion, the conflict is resolved by the Washington Enforcement Division of the Chief Counsel's Office * * *.

If the Assistant Regional Counsel decides that prosecution is warranted, he sends the case directly to the Justice Department. An information report of his decision is sent to the Washington Enforcement Division.[9]

WASHINGTON ENFORCEMENT DIVISION

The office of the Chief Counsel of the Internal Revenue Service in Washington has an Enforcement Division. Where a protest to the dropping of criminal charges has been lodged at the national level by the Director of the Intelligence Division, the protest goes to the Enforcement Division. After a review of the case by the division, if the Chief Counsel is of the opinion that no criminal prosecution should be had, he will attempt to secure a withdrawal of the protest made to the dropping of the criminal charges. In any event, however, the Chief Counsel has final authority and his decision as to criminal prosecution is binding.

---

[7] Although the Internal Revenue Service has an elaborate "Statement of Procedural Rules" (see 26 CFR, Part 601; 20 Fed Reg 127) with an abundance of detail as to civil tax procedures, it contains little information with respect to the criminal investigation process, and nothing as to what test the special agent should use in making his recommendation. Therefore, it is submitted, that the animus of the Executive is relevant and material and at issue herein.

[8] Audit and Intelligence Division of Treasury Department. RIA Tax Coordinator [paragraph] V-3402; 34 AM JUR 2d, Federal Taxation [paragraphs] 9263, 9264.

[9] Function of Assistant Regional Counsel-Enforcement in tax fraud cases. RIA Tax Coordinator [paragraph] V-3402.

The Enforcement Division also takes an active interest in a potential criminal prosecution where a conflict arises by reason of the rejection by the Justice Department of an Assistant Regional Counsel's recommendation to prosecute.[10]

ROLE OF JUSTICE DEPARTMENT

When the Regional Counsel decides that criminal prosecution is in order, he makes that recommendation directly to the Justice Department in Washington. The Assistant Attorney General in charge of the Tax Division receives the case and sends it to the Criminal Tax Section of his division. The case is assigned to one particular attorney. After he has studied the case, he makes a report which is reviewed both in the Criminal Tax Section and in the Tax Division. If a decision not to prosecute is made, the case is sent back to the Revenue Service's Chief Counsel. If his Enforcement Division disagrees with the decision, it will protest it. However, it can only try to convince the Justice Department that it should prosecute; it cannot force prosecution if the Justice Department refuses to change its mind.

The attorney writes a memorandum on the case concluding with recommendations * * *

The report of the reviewing attorney is checked by his superior, is sent to the Chief of the Criminal Section, and finally to the Assistant Attorney General in charge of the Tax Division.[11]

TAXPAYER CONFERENCES

Unlike a normal tax situation, a taxpayer who is involved in a possible criminal case is not given many opportunities to present his side of the case. The taxpayer [can have] direct contact with government representatives [which] might enable [him] to influence the course of the investigation. . . .

[I] CONFERENCES IN INTELLIGENCE DIVISION

[Judge Claiborne was Afforded None]

[II] CONFERENCE IN OFFICE OF REGIONAL COUNSEL

[Judge Claiborne was Afforded None]

The taxpayer is granted the opportunity for a conference when his case is assigned to a field attorney in the Assistant Regional Counsel's Office. After the government attorney has studied the case, he will usually offer (sometimes by mail) to confer with the taxpayer and his lawyer. One or more of the attorneys on the staff of the Assistant Regional Counsel's Office may be present at the conference and a record is usually made of anything the taxpayer has to say. The taxpayer will first be advised of his constitutional rights and the representatives of the Internal Revenue Service will usually discuss the case from a legal viewpoint. The field attorney is interested in filling in the legal aspects of the case. The government representatives are likely to outline the basic propositions on which they rest their case and may indicate proposed deficiencies for civil purposes. While these figures are not necessarily relevant to criminal tax deficiency, some idea may be obtained of the outside limits of liability. Efforts [by the] taxpayer [can] be directed toward convincing the field attorney that the evidence collected is legally deficient, or that the taxpayer has satisfactory defenses to any criminal prosecution. . . .

[III] CONFERENCE WITH JUSTICE DEPARTMENT

After a case reaches the Justice Department, it is assigned to an attorney in the Criminal Section of the Tax Division. It is not the practice to invite the taxpayer to another conference at this point, but one will be granted if the taxpayer requests it. . . .

[Judge Claiborne availed himself of such a conference. It proved to be a futile charade, since the government participants were relying on the theory that Judge Claiborne received monies from Joseph Conforte].

---

[10] Function of Washington Enforcement Division in tax fraud case. RIA Tax Coordinator [paragraph] V-3402.

[11] Handling a tax fraud case through the Justice Department. RIA Tax Coordinator [paragraph] V-3403.

[IV] "LAST CHANCE" CONFERENCE WITH U.S. ATTORNEY

[Judge Claiborne was Afforded None]

The taxpayer has one last chance for a conference when the case is assigned to the local United States attorney for prosecution. Particularly if the file has been received by him with only a qualified recommendation for prosecution, much advantage may be gained by the taxpayer from a conference with the United States attorney, since argument may be directed to local factors. For instance, the taxpayer's local reputation may be so high that it would be difficult to find a jury willing to convict him. Local prejudices, reliability of witnesses, and other such factors may be taken into consideration by the United States attorney in arriving at his decision as to prosecution. If he decides not to prosecute, the chances are excellent that the Justice Department will not overrule his decision, even though it has made an unqualified recommendation of criminal prosecution of the taxpayer. Argument at this conference should therefore be directed to additional considerations that may convince the local United States attorney that a conviction could not be obtained, and that, after all, his is the ultimate decision as to whether conviction is reasonably probable in the case.[12]

[Of course, Judge Claiborne had no contact with the Nevada United States Attorney since the investigation of his activity was being conducted by Stephen Shaw of the Public Integrity Section based in Washington, D.C., through, in large part, grand juries situated in Portland, Oregon].

OPPOSITION TO SUGGESTION TO VARY ARTICLES OF IMPEACHMENT

There has been some suggestion that this Honorable Body can alter the basis upon which to conclude its judgment on matters other than those which are specifically alleged in the Articles of Impeachment.

The four Articles of Impeachment are grounded on the basis that Judge Harry E. Claiborne, "willfully and knowingly" engaged in criminal activity which constituted misconduct sufficient to justify removal from office. The Articles do not suggest that a finding of "gross negligence" would suffice as the standard for judgment.

Judge Claiborne carved his defense and presented the same to the Committee Established Pursuant to Rule XI based on the particulars alleged in the Articles of Impeachment.

To now vary the charges, after the proofs have in large part been produced, would be fundamentally unfair and violative of the accused citizen's due process guarantees afforded by the United States Constitution.

Authority for the proposition that the Articles are not subject to variance is founded on Thomas Jefferson's analogy of the impeachment process to the process of laws founded within the criminal justice system. "The accusation (articles) of the Commons is substituted in place of an indictment." Constitution Jefferson's Manual and Rules of the House of Representatives of the United States Ninety-Ninth Congress, Wm. Holmes Brown Parliamentarian, U.S. Government Printing Office, Washington, 1985, p. 293. "They can neither omit any part of the legal judgment nor add to it. Their sentence must be secundum non ultra legem (citation omitted). This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevailed. . . ." ibid at p. 299.

VARIANCE

The seminal case of "variance" is *Berger* v. *United States*, 295 U.S. 78, 82 (1935), which held that reversible error exists where the variance between the charge and proof was such as to affect the substantial rights of the accused.

In the impeachment trial, in response to Harry E. Claiborne's Motion for Bill of Particulars, the House Managers limited the scope of the Articles to evidence of alleged "willfullness" in the Articles and specifically addressed the issue as to whether the Senate could, pursuant to Article IV, remove Judge Claiborne if they believed his activity was grossly negligent:

Mr. CHABRAJA: "I do not think it is fair * * * I think we would have to have brought an additional article."

The Berger Court reasoned that the accused must be definitely informed as to the charges against him so that he can prepare for trial and not be surprised by evidence produced.

---

[12] Conference with U.S. Attorney. RIA Tax Coordinator [paragraph] V-3412.

Other courts have agreed with the Berger standard and have added that the charging document should be sufficiently definite as to prevent the prosecutor from changing the theory of the case.

In *Russell* v. *United States,* 369 U.S. 749, 765–766 (1962), the Supreme Court held that in order to satisfy basic principles of fundamental fairness the subject under inquiry must be identified with reasonable certainty, to inform the accused of the nature of the accusation against him.

Another purpose of specificity of the charging document, the Russell Court, supra, states, is to inform the tribunal "of the facts alleged, so it may decide whether they are sufficient in law to support a conviction, if one should be had." Citing *United States* v. *Cruikshank,* 92 U.S. 542, 558.

Jefferson also provides guidance for the proposition that for conduct to constitute an impeachable offense, it must be criminal: "The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some member to impeach him. . . ." Constitution Jefferson's Manual, supra, at 289.

To suggest a level of conduct such as "gross negligence" to be the standard would run contra to precedent which requires the conduct to be criminal, i.e.—"willfull" be it felony or misdemeanor. See, *United States* v. *Bishop,* supra.

CONCLUSION

It is essential that the Honorable Senate recognize that substantial issues, such as the failure of the Internal Revenue Service and the Justice Department to follow normal procedures, was never permitted to be aired before the jury sitting at Judge Claiborne's trial.

In spite of the fact that several Senate Committee members were concerned with the aforementioned and also the campaign directed against Judge Claiborne by the Justice Department, the trial judge refused to permit any testimony at the time of trial concerning these issues. The trial transcripts are replete with comments from the Bench denying Judge Claiborne the opportunity to receive a full and fair trial by allowing him to present evidence essential to his defense.

Equally important, the prosecution failed to disclose exculpatory material to the defense and the trial court did not remedy that error, thereby depriving the jury of vital information. These representations are not self-serving but have been recognized in the Honorable Stephen Reinhardt's decision found at 781 F.2d 1327 (9th Cir., 1986) in *United States* v. *Claiborne.*

Indeed, it is necessary that the Senate consider all that was previously omitted from consideration by the jury in order for the Senate to perform its constitutionally mandated function of providing Judge Claiborne with an autonomous trial.

Respectfully submitted,

Harry E. Claiborne.

(By Oscar B. Goodman, Esq. and Hon. Howard W. Cannon, Attorneys for Respondent.)

[In the Senate of the United States Sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

SUPPLEMENTAL MOTION FOR FULL AND FAIR IMPEACHMENT TRIAL BEFORE THE ENTIRE SENATE OF THE UNITED STATES, OR IN THE ALTERNATIVE FOR DISMISSAL

The Respondent, the Honorable Harry E. Claiborne, by and through his counsel, Oscar B. Goodman, Esq. and the Honorable Howard W. Cannon,[1] by this pleading respectfully and emphatically moves for a full and fair impeachment trial before the entire Senate of the United States, or in the alternative for dismissal of the Articles of Impeachment. As authority therefore, Judge Claiborne relies upon the Constitution of the United States, the Senate Rules of Procedure, all pleadings presently on file herein, the record on file herein and the attached Memorandum, all of which are incorporated by reference herein.

Respondent, Harry E. Claiborne, alleges as follows:

1. That seven (7) days of testimony was presented to the Senate Committee convened pursuant to Rule XI of the Senate Rules on Impeachment.

---

[1] This pleading was prepared with the assistance of co-counsel, David Z. Chesnoff, Esq. of the firm of Savarese and Chesnoff, Ltd.

2. That after these seven (7) days of hearings not one single witness was produced by the House Managers that questioned Judge Claiborne's integrity as characterized by the witnesses presented by Judge Claiborne, and in fact the House conceded that Judge Claiborne was of fine character and a respected jurist in its Motion In Limine, (Part I, p. 500), and not one character witness was even cross-examined by the Managers (Part I, pp. 829–844).

3. That the hearing held by the Committee, whose "Charter" was unique in the annals of the Senate, [was] a limited one. "It had been created not in any sense to conduct a trial of this bill of impeachment, nor even to recommend the ultimate outcome of the process, but to develop the record on which the Senate may act." Chairman Mathias (Part I, p 41).

4. In this spirit, the Committee clearly served the desired purpose. The evidence adduced at the Committee level, revealed that quite clearly the Judge believed at the time he executed the disputed returns that he was the target of a calculated four (4) year campaign by the Executive (United States Justice Department); and, furthermore, that the judicial process, did not permit an airing of the issues, as the full Senate is embodied to do, and must do, to perform its constitutionally mandated function of conducting a trial of impeachment.

5. That the Rule XI Committee limited the expanse of the evidence because it acknowledged it was not the trier of fact, but an information gatherer.

6. That the patient and insightful questioning of the Senate Committee members laid the foundation for the full trial before the Nation, the "Inquest" contemplated by the Constitutional framers. Several members of the Committee apparently had additional questions to ask, but the Committee was bound by time constraints. See e.g. (Part I, pp. 1110, 1112, 1115–1116, 1119, 1123, 1127, 1130.)

7. That the United States Senate historically has never deviated from the course of permitting a full and fair trial before the entire Senate when considering Articles of Impeachment.

8. That the proceedings before the Committee raised substantial issues of law and fact.

9. That the Senate Committee exhibited concern and suggested they had additional inquiry.

10. That it took the Senate Committee seven (7) days to receive evidence, even though the presentation was limited.

11. That the Committee had originally hoped to conclude the hearings in five (5) days.

12. That it would be impossible for the full Senate of the United States to fully digest the Committee transcripts in the time frame presently established.

13. That considering the Committee hearings fell short of a constitutionally mandated Senate trial to which Judge Harry E. Claiborne, and the American People, are entitled, it is respectfully submitted that an abbreviated review of the transcripts would constitute an abrogation of the United States Senate's constitutional function.

14. That it is respectfully submitted that considerations concerning calendaring have no place in the equation when the Senate is required to perform a fundamental function in our Republic's scheme of checks and balances.

15. That the House of Representatives, as prosecutor, would have this august body expeditiously "rush to judgment", thereby denying to the Honorable United States Senate its constitutionally mandated and created power to conduct a full trial, separate and distinct from any judicial proceeding.

16. That the Honorable Harry E. Claiborne has proclaimed his innocence of all charges from the inception of the Executive's campaign against him. He has filed legal pleadings; pretrial, during trial, after trial, appeal, post appeal. He has most eloquently stated his innocent posture at the proceedings before the Committee. (Part I, pp. 924–1042 and 1106–1179).

17. That Harry E. Claiborne does not resign, but instead requests the imperative of a full Senate trial, bespeaks the illogic of any position that proposes a shortening of a full trial before the Senate.

18. That Harry E. Claiborne's detractors would argue that the judicial proceeding does not bar his impeachment trial by reason of double jeopardy. Nor did the Executive agree that the Judge had to be impeached before undergoing a judicial proceeding. As a direct result thereof, the Senate trial must be treated as a distinct and autonomous proceeding with all the inherent guarantees attendant to a full and fair trial.

19. That to deny the Honorable Harry E. Claiborne the opportunity to call witnesses at such a constitutionally mandated trial would be unconstitutional.

20. That any trier of fact must, in order to reach a proper and fair determination, view witnesses and judge, not just their words, but their demeanor. An abbreviated proceeding before the Senate would deny the Honorable Harry E. Claiborne, and the American People due process of law. It is respectfully submitted that it would be a dereliction of duty to each Senator's constituents, to presume to substitute the typed transcript of the Committee proceedings in place of a full evidentiary trial. Without having viewed the proceedings, how could each trier cast a meaningful vote?

21. That the exercise of expediency, at the expense of important and deliberate legislative function, would only further exacerbate Judge Claiborne's (an Article Three, life-tenured, federal judge) contentions that he has been and is treated differently from other citizens, a concern voiced by Senate Committee members.

22. In support of Harry E. Claiborne's contention, he commends attention to the fact he has been subjected to investigation by four, not one, grand juries convened to indict him. Three grand juries convened outside of the city in which Judge Claiborne had lived for some thirty years; Grand jury witnesses perjured themselves; A convicted felon, procurer and fugitive was forgiven sixteen ($16,000,000.00) million dollars in outstanding Internal Revenue tax indebtedness as consideration for testifying against Judge Claiborne; The Nevada Regional Director of the Internal Revenue Service was removed from his position when he would not condone unconscienable plans against the judge; Numerous people were openly solicited by the Agent in Charge of Nevada FBI Office, Joseph Yablonsky, to cooperate in "stings" against the Judge. Others were investigated or indicted, and then promised leniency or forgiveness if they would injure the Judge; The Judge and a state court colleague were the subjects of a "mail cover"; Judge Claiborne was the subject of what was characterized as a "black bag" break-in of his home; The Judge was never notified by the Internal Revenue Service about queries concerning his return (as would be the normal procedure for any United States citizen); Instead he was indicted; A special "hand-picked" judge presided over the investigating grand juries and over his trial; A special "hand-picked" appellate panel reviewed his case, notwithstanding procedural prohibitions against the same were existent at the time of such selection; That in the most rare of occasions multiple dissenting opinions addressing the denial of Judge Claiborne's request for a rehearing en banc of his appeal were filed, which condemned the appeal's panel for failing to properly review the record of the trial and in failing to review exhibits and evidence and the process by which the panel was selected. That even though Judge Claiborne was in his late sixties and had led an exemplary life, having been lauded on the floor of the United States Senate during his confirmation hearings, the "handpicked" federal judge who tried him sentenced him to incarceration in a federal prison, when other people would never even have been tried based on the tax returns filed by Judge Claiborne.

23. That it would be a constitutional shame if once again Judge Claiborne were to be treated differently from other American citizens. In the entire history of our Republic impeached officials have been given a full trial before the Senate. Impeachment trials have averaged from sixteen (16) to seventeen (17) days according to the literature. Such a solemn ceremony has not taken place in the past half century. There is not a member of the Senate who was in office during the last impeachment. It would be a tragedy of our system of checks and balances, which is designed to assure the independence of the judiciary, if the Senate of the United States once again permitted Harry E. Claiborne to be treated differently from all those who have preceded him in such proceedings. It was, afterall, through and after full and fair trials, that many who stood impeached by the House of Representatives were not convicted by the Senate.

24. That had not Judge Claiborne alleged that his prosecution (persecution) was the product of Justice Department overreaching, the "chilling" of the judiciary, the unique manner in which he was convicted and how that conviction was affirmed, that had he not maintained his absolute innocence, that were his character not so resolutely affirmed by sworn witnesses, the proceedings before this Honorable body, implicitly would be brief. Where, however, Senate Committee members were moved to vigorously inquire about the spectre of executive misconduct, to openly question the Judge's culpability, and for the Judge to withstand intensive examination by twelve learned men and a retained prosecutor, steadfastly maintaining his innocence to the impeachment charges, then any proceeding short of the full trial requested, it is respectfully submitted, would reflect Senatorial insensitivity to its sanctified constitutional responsibility.

25. That President John F. Kennedy, in Profiles in Courage, warned about prejudging individuals faced with impeachment. Each and every Senator, as burdensome as it might seem, must hear all the evidence in order to satisfy the Command

that a trial occur in the United States Senate before a life-tenured Article Three Judge could contemplatively be removed from office. It is respectfully submitted that after a full and fair trial before the entire Senate of the United States that the Honorable Harry E. Claiborne will be found not guilty by the Honorable members of the Senate.

Wherefore, the premises considered, Harry E. Claiborne prays that this Honorable Senate grant a full trial before the entire United States Senate.

Respectfully submitted:

HARRY E. CLAIBORNE.

(By Oscar B. Goodman, Esq. and Honorable Howard W. Cannon, Attorneys for Respondent.)

I. THE UNITED STATES CONSTITUTION, THE FEDERALIST PAPERS, CASE LAW AND THE RULES OF THE SENATE MANDATE A FULL EVIDENTIARY TRIAL BEFORE THE ENTIRE UNITED STATES SENATE

It is respectfully submitted, and acknowledged by the Committee Chairman, the Honorable Senator Mathias, that the Rule XI Committee's "charter" was "limited" and that the Committee was not "created * * * in any sense to conduct a trial of [the] bill of impeachment." Rather, it was for "the Senate to carry out * * * its unique constitutional power to try all impeachments." (Part I, p. 41).

" * * * So there are particular moments in public affairs when the people, stimulated by some irregular passion . . . or misled by the artful misrepresentation of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutory will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow mediated by the people against themselves, until reason, justice and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passion? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statutes on the next." The Federalist, No. 63.

In the following, Judge Claiborne will reiterate the historical importance of permitting him to confront the witnesses against him and for this Honorable Body to permit him to call the witnesses he chooses so that the intent of Article I, Section III of the United States Constitution can be assiduously adhered to by the Senate.

The Federalist Papers which historian Clinton Rossiter described with little exaggeration as standing third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history, (The Federalist, Mentor, 1961 at p. vii), justified the need for the Senate to assure a well-ordered and long-lived Republic to conduct such a proceeding.

The Framers wisely provided in Article One, Section Three, of the Constitution, that "The Senate shall have the sole Power to try all Impeachments."

Now "interested men" urge the Senate to assume its unique constitutional position as the sole fact finder and judge in this impeachment proceeding.

There are very few checks on the Judiciary and Executive power. The Federalist Papers make it clear that the sole power of impeachment is one of those necessary Constitutional checks.

Our system of constitutional government is based upon the remarkable concept of separation of powers, which has its roots in Western European struggles between legislative bodies and monarchs. See, W.B. Gwyn, The Meaning of the Separation of Powers (Tulane Univ., 1965).

English precedent formed the basis of the Framers of the Constitution's position as it related to impeachment. Power consistently was passing between the King and the Parliament from the time of the English Civil War. These historical developments led to the formulation of a delineation of powers. J. Locke, Second Treastise of Government [An Essay Concerning the True Origin, Extent and End of Civil Government].

It was Montesquieu, however, whose writings were accepted throughout Western Europe and the American Colonies, in the Eighteenth Century, who captured the spirit upon which the Constitutional Framers relied.

Montesquieu observed that any combination of judicial, legislative or executive powers would create a system whose path would lead to inescapable tyranny and absolutism. Montesquieu, The Spirit of the Laws, 151-2 (Nugent Trans. 1949).

As a result the Honorable Harry E. Claiborne respectfully submits that the proposal by the House of Representatives to limit his defense would create the antithesis envisioned by Locke, Montesquieu and the Framers.

Since the days of the American Revolution the concept and sanctity of the separation of powers has been embedded in our system of government.

The United States Constitution was drafted in a manner consistent with the rationale of Montesquieu. The Framers sought to establish a system of checks and balances between the branches and to prevent the cancerous growth of exhorbitant power in any one branch of government.

The concept of checks and balances is relied upon by Judge Claiborne. The significance of the Senate permitting a full trial cannot be understated. It will ensure the functioning of our constitutional system; it must accede to preconceptions or expediency.

Benjamin Franklin, in reflecting upon the moral imperative of impeachments wrote:

"What was the practice before this in cases where the chief magistrate rendered himself obnoxious? What recourse was had to *assassination* in which he was not only deprived of his life but of the opportunity of vindicating his character? It would be the best way, therefore, to provide in the Constitution for the regular punishment of the executive when his misconduct should deserve it, and *for his honorable acquittal when he should be unjustly accused.*" Benjamin Franklin, 1787 (italic added).

The House proposal would have Judge Claiborne convicted without benefit of procedural and substantive due process and without an opportunity to vindicate his reputation. Judge Claiborne has claimed he has been improperly maligned and that his judicial function has been disrupted. These allegations are too serious to be ignored for expediency's name.

Significantly the Executive and the Courts did not bar his judicial trial. Why then, should the impeachment trial not be accorded the same solemn autonomy? They are independent of each other. A trial on the merits is mandated in order to assure that the power of the Executive does not become so wholly concentrated as to subvert and chill the function of an independent federal Judiciary.

If the House of Representatives believes that the Judicial proceedings against Judge Claiborne are all that are constitutionally contemplated, then it is submitted that the Judge is serving his punishment and these proceedings should be dismissed. If not, then the Judge should be permitted the opportunity to plead his case before the Senate. Contrary to the assertions of the House of Representatives, Judge Claiborne has always vigorously claimed that he has been denied due process, and has been subjected to encroachment upon his sworn function as a judicial officer as a result of criticizing misconduct by the Executive who prosecuted cases in his Court.

If the House of Representatives seeks to read impeachment in terms of the previous criminal prosecution they invite the bar of double jeopardy. *Richard Screw Anchor Co.* v. *U.S.*, 275 U.S. 331 (1928); *U.S.* v. *Jim Fuey Moy,* 421 U.S. 439, 401 (1916).

The integrity and independence of the judiciary was protected by the Constitution by the appointment for life of Federal judges. The politically astute Framers, all of whom swelled within with the cause of liberty and protection of people's rights, recognized that this life term was necessary to insure a judiciary that would be independent, a judiciary which would and could protect the rights of the citizen from abuses by the Executive and Legislative Branches, without fear of reprisal.

In support of the concept of separation of powers as it related to impeachment, Alexander Hamilton wrote:

"Would there not be the greatest reason to apprehend that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision?

"By making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial.

"Juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt." [Hamilton, Federalist Papers]

James Madison forewarned: "Were the power of judging joined to the executive power, the judge might behave with all the violence of the oppressor."

This Honorable Senate should be insulted by the House of Representatives' suggestion that the Senate's constitutionally mandated independent judgment be supplanted by the judgment of twelve lay citizens; twelve jurors who were deprived of hearing claims of executive overreaching as having been the reason for Judge Claiborne being tried.

The issues must be tried before the Senate to confirm again the separation of powers doctrine:

"The Judiciary is beyond comparison the weakest of the three departments of power, and all possible care is requisite to enable it to defend itself against attacks. *The general liberty of the people can never be endangered so long as the judiciary remains truly distinct from both the legislative and the executive* * * * [but] the judiciary is in continual jeopardy of being overpowered, awed, or influenced by its coordinated branches." [Hamilton, Federalist Papers] (italic supplied).

In effect the Senate would be sanctioning the procedures chosen by the Executive, which resulted in indictment, conviction and incarceration of Judge Claiborne, should the Senate adopt the House of Representatives' proposal of summary disposition.

It should also be noted that the division of functions which assigned the role of prosecutor to the Commons while the Lords sat in judgment was the "model" of the parallel division of impeachment functions between the House of Representatives and the Senate. Federalist Paper No. 65 at 425.

The House of Representatives wants, as prosecutor, to convict Judge Claiborne. Unfortunately, they seek their conviction by attempts to usurp Senatorial power and in derogation of the Constitution of the United States, in the name of expediency. The House of Representatives would ask the Senate of the United States to ignore critical constitutional issues affecting the fabric of our system of government.

The Honorable Harry E. Claiborne respectfully submits that our parallel House of Representatives/House of Commons, Senate/House of Lords impeachment procedures do not permit for less than a full trial before the entire Senate.

No research has shown of any reference to a Committee of the Lords for hearing of the evidence. The authoritative Raoul Berger, Charles Warren Senior Fellow in American Legal History, Harvard Law School, in his book, Impeachment: The Constitutional Problems (Harvard University Press, Cambridge, Mass., 1973, p. 171) has so found. A statement made by the Managers of the Lords at a conference between members of the Lords and Commons (reported January 18, 1691) confirms that "In the case of impeachments, which are the groans of the people * * * and carry with them a great supposition of guilt than any other accusation, there all the Lords must be judge." 4 Hatsell 343, 33, 342.

"When you are called upon to arraign an individual, and that individual a judge, everyone must be anxious that the attendance should be as full as possible." 7 Parl. Deb. 762 (1806). See also, Plucknett, Concise History, 232 of 1 Holdsworth 389 (7th Ed., 1956).

Judge Claiborne submits that impeachment is a carefully delineated process, tolerated only if exercised within bounds. "Limits" on Congress determined by Congress would be no limits at all. Federalists Papers Nos. 65 and 78. It "cannot be the natural presumption * * * that the legislative body are themselves the constitutional judges of their own powers. * * *" Federalist Paper No. 78 at 506.

Judge Harry E. Claiborne respectfully suggests that he not be faced with a similar scenario as existed at the time of the impeachment of President Andrew Johnson, that is that "prejudgment on the part of most senators * * * was brazenly announced." John Fitzgerald Kennedy, Profiles in Courage, 133 (N.Y., 1961).

In fact, those who propose a swift conviction on impeachment stood silent when Judge Claiborne argued that he could not be tried in a judicial proceeding prior to his actual impeachment and conviction. If the judicial function was an autonomous event, so, too, should his impeachment be.

II. EVIDENCE MUST BE HEARD ABOUT ALL THE EVENTS OCCURRING AT THE TIME OF THE ALLEGED ILLEGAL CONDUCT BY JUDGE CLAIBORNE, SO THAT THE SENATE AS THE TRIER OF FACT, CAN PROPERLY JUDGE HIS STATE OF MIND AT THE TIME IN DETERMINING HIS GUILT OR INNOCENCE

Federal Rules of Evidence 803(3), contemplates statements confirming the mental condition of a defendant as they are sufficiently trustworthy. Dangers of misperception, faulty memory, or insincerity may be less when the evidence relates to existing mental, emotional or physical states of the defendant. Moore's Federal Procedure § 803(3)

The Honorable Harry E. Claiborne and all who will testify about their perception and memory of events of the campaign against Judge Claiborne will be available for cross-examination. It is significant that the House does not fully deny the claims of Judge Claiborne, but rather would have them kept from the Senate. Clearly, the perceptions of Judge Claiborne of the events transpiring at the time he is alleged to have formed criminal intent to violate the tax laws must be publicly aired. To do otherwise would be to deny him due process. It is axiomatic that state of mind evidence is admissible to show lack of criminal intent.

In *United States* v. *Taglione,* 546 F.2d 194 (5th Cir., 1977), a defendant was charged with making extortionate demands for return of credit card invoices which he had forged. The defendant claimed that he had merely been negotiating for a reward. It was error to have excluded the testimony of the defendant's former attorney as to a conversation in which the defendant asked if it would be legal to negotiate for a reward. The statement is admissible pursuant to Federal Rules of Evidence § 803(3). See also *United States* v. *Ottley,* 509 F.2d 667 (2d Cir., 1975) (regarding a union official charged with a violation of federal statute requiring records be maintained in sufficient detail to substantiate claims for reimbursed cash expenses. State of mind was in issue because the statute applied only if its provisions were violated "wilfully". This principle applies to statements of third persons made to a principle. In *Scholle* v. *Cuban-Venezuela Oil Voting Trust,* 285 F.2d 318 (2d Cir., 1962), the Court held that the Hearsay Rule does not bar admission of statements used circumstantially, since, when so used the primary focus of inquiry is whatever inferences can be drawn from the fact that the words were spoken and not the truth of what was said." 285 F.2d at 321.

The Honorable Harry E. Claiborne respectfully submits that his claims of improper conduct by the judiciary were acknowledged in the dissents filed by Circuit Judges Ferguson and Reinhardt styled *United States* v. *Claiborne,* 781 F.2d 1325 and 1327 (9th Cir., 1986). (For a complete text of these dissents, see Part I, pp. 521–538.)

Finally, "Impeachment" Miscellaneous Documents, Committee on Rules and Administration, United States Senate (August 7, 1974), Memorandum IV On the Rules of Evidence for Senate Impeachment Trials, makes it clear that it was deemed advisable that all evidence not trivial or obviously irrelevant shall be received without objection. It is respectfully suggested that evidence that tears at our constitutional heart and depicts intimidation of an independent judiciary cannot be characterized as trivial or irrelevant.

Furthermore, "The Senate is not just like a court in an impeachment trial. It is the Senate acting". Ibid at 245.

This Honorable Senate, in fulfilling its constitutional mandate must provide this responding Article Three Judge with a full and fair opportunity to present the truth in order for him to be fully exonerated and restored to his independent role of dispensing the duties of his branch of government. In *Powell* v. *McCormack,* 395 U.S. 486, 506 (1969), the Supreme Court stated: "[i]t is the province and the duty of the judicial department to determine . . . whether the powers of any branch of the government . . . have been exercised in uniformity to the Constitution, and if they have not, to treat their acts as null and void."

III. IN ORDER TO GUARANTEE JUDGE CLAIBORNE AND THE AMERICAN PEOPLE DUE PROCESS OF LAW AND THE TRIAL MANDATED BY THE UNITED STATES CONSTITUTION, IT IS RESPECTFULLY SUBMITTED THAT EACH SENATOR MUST VIEW THE WITNESSES AND THE EVIDENCE AND ANY ABBREVIATION OF THIS HISTORICALLY DOCUMENTED PROCESS, WOULD BE UNLAWFUL AND UNCONSTITUTIONAL

A. Demeanor Evidence Is An Essential Element of a Fair Trial.

The demeanor of a witness traditionally has furnished the trier of fact with valuable information concerning the significance of testimony. *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 495–496 (1951).

In the instant case the demeanor of witness Watson before the Committee, especially the bravado with which he testified under oath, led Committee members to conclude that he was an individual completely willing to present himself as capable and convincingly so, when in fact his ineptness was the subject of senatorial disdain. (Part I, pp. 115–116).

A witness testifying before the United States Senate Impeachment Trial, as many have done throughout our country's history, will undoubtedly be impressed with the solemnity of the occasion and the possibility of public disgrace. In fact, willingness to falsify may reasonably become more difficult. Judge Claiborne's detractors, unprotected by a less than full trial, as was the case in the judicial trial, will be compelled to be forthright or else they will be discovered by an insightful Senator.

Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the requirement that testimony be taken orally in open court. The

Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

Cross-examination, and the co-extensive demeanor extracted therefrom, are a vital feature of our Anglo-American System of Justice. Cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth" 5 Wigmore § 1367, p. 29.

The belief that the examination of live witnesses is effective in exposing imperfections of perceptions memory and narrative is fundamental. Morgan, Forward to Model Code of Evidence 37 (1942).

A crucial function of the trier of fact is to evaluate questions of credibility based upon the observation of whomever is testifying. (For example, a reading of the transcript of the Committee proceedings would fail to reveal the incessant handwringing and obvious nervousness of I.R.S. Agent Skelton while testifying, under oath, about his abusive interaction with potential witnesses while preparing them to testify against the Judge.)

Only by personal observation can this Senate weight the credibility of a witness. Mr. Chief Justice Appelton wrote concerning observation of demeanor:

"[T]he promptness and unpremeditatedness of answers or, the reverse, their distinctiveness and particularly of the weight of these essentials, their incorrectness in general, or particulars, their directness or evasiveness * * * The appearance and manner, the voice, the gesture, the readiness and promptness of their answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, *hate, envy or revenge*—are all open to observation * * *." Wigmore on Evidence, 3d Edition, § 1395; Appleton Evidence 220 (*added.*)

In *N.L.R.B.* v. *Dinion Coil Co.*, 201 F.2d 484, 487, 488 (2nd Cir., 1952), the late Judge Jerome Frank eloquently wrote that demeanor evidence "has had a long history" and that:

"[i]n the earlier period of Roman legal development, * * *, the witnesses testified orally before the judges, and the practice of having oral testimony heard by the judge prevailed originally in the Roman-canonical procedure [footnote omitted], Ullman tells us that the 14th Century Postglossators—who, as judges or advocates, 'had their eyes fixed upon the practical administration of law—maintained that the '*indispensible requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him personally* * * * The personal impressions made upon the judge by the witnesses, their way of answering questions, their realities and behavior in Court, were the only means of ascertaining whether their statements were trustworthy or not." (*added.*)

In *Creamer* v. *Bivert*, 214 Mo. 433, 113 S.W. 1118,1120–1121, the Court observed: "* * * one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, * * *, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in part, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify * * *."

The astute and scholarly Judge Frank further intoned:

"For the demeanor of an orally-testifying witness is 'always assumed to be in evidence'. It is 'wordless language'. The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the Trial Court by his manner, his intonations, his grimaces, his gestures, and the like-all matters which "cold print does not preserve" and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were titled a 'rehearing court', is not a seeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to produce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' it resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him." *Broadcast Music* v. *Havana*, 175 F.2d 77, 80 (2nd cir., 1950).

In conclusion, each and *every* Senator, in fulfilling his constitutional function as a trier of an impeachment, cannot rely solely on the written transcript. Afterall, "the most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gesture which he had learned to associate with falsehood * * *." "Every man must learn matters of this sort himself." *N.L.R.B.* v. *Dinion Coil, supra* at p. 489. (Italic added.)

Respectfully submitted:

Harry E. Claiborne.

(By Oscar B. Goodman, Esq. and Honorable Howard W. Cannon, Attorneys for Respondent.)

[In the Senate of the United States sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Supplemental points and authorities re collateral estoppel and summary disposition of Third Article of Impeachment

Should you feel inclined to censure
Faults you may in others view,
Ask your own heart, ere you venture,
If that has not failings, too.

Do not, then, in idle pleasure,
Trifle with a brother's fame,
Guard it as a valued treasure,
Sacred as your own name.

Do not form opinions blindly.
Hastiness to trouble tends;
Those of whom we thought unkindly,
Oft become our warmest friends.

Philip Paul Bliss.

I. Preliminary Statement

By way of pretrial motion, the House of Representatives attempts an end-run around the Impeachment process in raising the August 10, 1984 conviction of Judge Claiborne of two counts of violation of Title 26, United States Code, Section 7206(1) as an offensive weapon which would collaterally estop Judge Claiborne from challenging Articles I and II of the Articles of Impeachment.[1]

Even more alarming is the House's request for summary disposition of the Third Article of Impeachment on the notion that Judge Claiborne is guilty of "high crimes" and "misbehavior" based solely on a conviction for violation of 26 U.S.C. Section 7206(1). Prior to, and in the absence of, the presentation of any evidence herein, the House sought the summary disposition of the Third Article of Impeachment under doctrines of finality, full faith and credit and collateral estoppel. The evidence now before the Senate[2] militates against ever swapping one separate constitutional mandate for another.[3]

26 U.S.C. Section 7206(1) does not embody "moral turpitude."

The Motion for Summary Disposition as to Third Article of Impeachment necessarily hinges on the faulty premise that the issue of fraud, in one form or another, was necessarily before the jury, and necessarily decided by the jury in returning a verdict of guilty on two counts of violation of Section 7206(1). On the contrary, 7206(1) is not the crime of tax evasion, nor is fraud an element of the offense.

Although the term "willful" found in Sections 7201 (evasion) and 7206(1) (statement) has the same meaning,[4] each requires perpetration of a different act.[5] In *United States* v. *Considine*, 683 F. 2d 1285 (9th Cir. 1982), the Court of Appeals for the Ninth Circuit confirmed the distinction that must be made here:

"The express language of Section 7201 requires an intent to avoid tax (a legitimate synonym for fraud). Section 7206(1) (false return), however, does not require any fraudulent intent." (citations omitted) "*Because Section 7206(1) does not require a willful attempt to evade tax a conviction under Section 7206(1), without more, does not establish fraudulent intent.*" (emphasis added) (citation omitted).

---

[1] Articles I and II allege that Judge Claiborne "willfully and knowingly" made false statements on his federal income tax returns for 1979 and 1980, in violation of 26 U.S.C. Section 7206(1).

[2] Attention is directed particularly to the compelling testimony of Kenneth Swanson, Charlotte Travaglia and the affidavit of Esther Arthur.

[3] Had the Senate summarily disposed of the Third Article of Impeachment, this body, and the nation, would not now know that there is indeed some fire beneath the shrouded smoke of an overzealous, overreaching, and misguided executive branch of government.

[4] See *United States* v. *Bishop*, 412 U.S. 346, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1973).

[5] *United States* v. *Bishop*, supra, at 360 n. 8, 93 S. Ct. 2017 n. 8; See also *Considine* v. *United States*, 683 F. 29 1285, 1287 (9th Cir. 1982).

The House argues that tax evasion is a high crime or misdemeanor within the meaning of the Constitution and justifies removal from office.[6] That question is not before us since Judge Claiborne was not charged with nor convicted of evading taxes. This innocent "misspeak" by House's counsel reveals the manifest injustice in ever summarily disposing of any Article of Impeachment. Members of the Senate, relying on counsels characterization of the offense below as "evasion", might easily have inferred fraud, and ultimately "turpitude", from nothing more than a rumor.[7]

Relying only on the conviction below, the House urges that Judge Claiborne is now a "felon" and must be removed because public confidence cannot be maintained short of such action. Judge Claiborne submits that only through a separate and independent determination of the conduct alleged in the Articles of Impeachment can public confidence be maintained.

II. Offensive collateral estoppel cannot be applied without a fair and complete hearing on Respondent's claim

The House of Representatives recognizes that the Senate is not bound by the result of the issues presented in the criminal trial of Judge Claiborne, but urges that there are compelling reasons why the Senate sitting as a court of impeachment should choose to accept as already established certain issues which the House claims were necessarily resolved by the jury below.

In *Huntington* v. *Attrill*, 146 U.S. 657, (1982), the United States Supreme Court confirmed the principle that a judgment which originates out of a "penal" cause of action does not fall within the parameters of full faith and credit under Article IV Section I of the United States Constitution.[8]

During the course of the presentation of evidence thus far in this proceeding, Judge Claiborne has directly refuted and placed in issue the House's assertion that he had a full and fair opportunity to prove his claim during the criminal proceeding.

Historically, the doctrine of collateral estoppel has been utilized as a defensive mechanism to present an unsuccessful plaintiff in one action from proceeding to a second forum and again attempting to relitigate an affirmative position. In *Blonder-Tongue Labs.* v. *University Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 Led. 2d 788 (1971), the United States Supreme Court discussed the conditions which must be present before a litigant will be estopped from asserting a claim. The Court held that a plaintiff "must be permitted to demonstrate, if he can, that he did not have 'a fair opportunity procedurally, substantively and evidentually to pursue his claim the first time.' (citations omitted)" 402 U.S. at 333. The Court went on in *Blonder-Tongue* to discuss those items which must be determined in order to conclude that a party had a fair opportunity to pursue his claim.

"Determining whether a patentee has had a full and fair chance to litigate the validity of his patent in his earlier case is in necessity not a simple matter. In addition to the consideration of choice of forum and incentive to litigation mentioned above, (footnote omitted) certain in other factors immediately emerge. * * * whether the opinions filed by the district court and the revealing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit; and *whether without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation*". (footnote omitted) (emphasis added)

Judge Claiborne has alleged, and certain evidence has already been adduced during this proceeding, that he was deprived both of crucial evidence and of knowledge and/or access to witnesses in the criminal proceeding. Judge Claiborne strongly urges that a full and complete trial must be had on all issues in order for this body to fully and intelligently determine whether or not Judge Claiborne was in fact deprived of a full and fair opportunity to present his claims during the criminal proceeding.

An examination of the transcript of the criminal proceedings, both at the trial level and the appellate level, together with the opinion of the specially appointed panel of the Circuit Court of Appeals for the Ninth Circuit, indicate that this is, in fact, one of those "relatively rare instances" where the courts have wholly failed to grasp the issues which were raised at trial and on appeal by Judge Claiborne.

---

[6] See Memorandum in Support of Motion for Summary Disposition of Third Article of Impeachment, pp. 19-21.

[7] Thus is exposed the pitfall of inductive reasoning—arriving at ultimate facts based upon general premises. If the general premise is faulty, the conclusion cannot be correct.

[8] See also *Hunt* v. *B.P. Exploration Company, Ltd.*, 492 F. Supp. 885 (N.D. Tex. 1980).

In *Parklane Hosiery Company* v. *Shore*, 439 U.S. 322, (1979), The United States Supreme Court extended the use of collateral estoppel to a plaintiff, with the ultimate effect of precluding defenses on the part of defendant. The Court found that the use of offensive collateral estoppel does not necessarily promote judicial economy, at least in the same manner as the defensive use does. *Parklane Hosiery Company* v. *Shore*, supra at 329. The Court made it clear that the offensive use of collateral estoppel is precluded where it may be unfair to a defendant.

"Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. *Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily use a different result. Parklane Hosiery*, supra at 330, 331." (emphasis added)

No set of circumstances could better illustrate the wisdom of the Supreme Court in establishing the above caveat to the enforcement of offensive estoppel as is presented by Judge Claiborne in this impeachment proceeding. At trial below, Judge Claiborne was forced to go to trial away from his home in Las Vegas, Nevada, and travel approximately 500 miles to Reno, Nevada and litigate in that distant forum. Judge Claiborne has also testified in this proceeding as to the apparent friction or tension between Las Vagas and Reno, Nevada residence.

"If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage full scale discovery or call witnesses, application of collateral estoppel may be unwarranted. Indeed, differences in available procedure may sometimes justify no allowing a prior judgment to have an estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. *The problem of unfairness is particularly accute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action.*" (Emphasis Added) *Parklane Hosiery*, 439 U.S. 322, 331 n. 15.

"We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. (Footnote omitted). The general rule should be that in cases where a plaintiff could easily have joined in the earlier action, or where, either for reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of collateral offensive estoppel." Id., 439 U.S. at 331.

The court in *Parklane Hosiery* also observed that a "stronger showing that the prior opportunity to litigate was adequate may be required * * *" Id. at 331.

The Senate now has the advantage of determining the propriety of allowing the use of offensive collateral estoppel in light of the evidence which has already been adduced during the proceeding. One glaring example rings through.

With respect to Judge Claiborne's 1979 income tax return, the major issue during the criminal proceeding was whether or not the April 11, 1980 letter from Judge Claiborne, which adequately discloses his legal fee income for 1979, was actually received by Judge Claiborne's accountant, Jay Wright.

"I submit to you, ladies and gentlemen, when you think about this that you will conclude that the only real issue in the 1979 year is whether Jay Wright got defense Exhibit 1. That is what it all comes down to, it is very simple.[9]

At the criminal trial, the government hotly contested and challenged the testimony of Judge Claiborne's secretary, Judy Ahlstrom, that she in fact delivered defense Exhibit I (HM-X-36) to Jay Wright's office. During the course of these proceedings before the Senate, it is now uncontested that Judy Ahlstrom in fact delivered an envelope on April 11, 1980 to Jay Wright's office. Two new witnesses were now available for the hearing before the Senate, Kenneth Swanson and Esther Arthur, both of which corroborate the testimony of Judy Ahlstrom. It is obvious, if this corroborating testimony and evidence would have been available at trial, a much different outcome would have been likely.

---

[9] Closing argument of William Hendricks, (Report of the Senate Impeachment Trial Committee, Part III, Page 1384).

In permitting the use of offensive collateral estoppel, the Supreme Court in *Parklane Hosiery Company, supra,* specifically noted that there were no procedural opportunities available to the petitioners that were unavailable in the first action "of a kind that might be likely to cause a different result." (Footnote omitted) 439 U.S. 322 at 332.

Judge Claiborne would respectfully submit, that even at this stage of the Impeachment proceeding, sufficient evidence has been presented to establish that were Judge Claiborne afforded even the limited scope of testimony that has been afforded thus far by the United States Senate, such procedural opportunities are of a kind that "might be likely to cause a different result." Ibid.

III. The judgment of conviction is subject to review under principles of Federal Rules of Civil Procedure 60(b), thereby necessitating a full and complete trial on the merits

Rule 60(b), Federal Rules of Civil Procedure, provides for relief from a judgment or order upon a showing of the following:

(1) Mistake, inadvertance, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

* * * * *

(6) Any other reason justifying relief from the operation of the judgment.

IV. The Uniform Enforcement of Foreign Judgments Act, as incorporated in Nevada law, requires a full and complete evidentiary hearing on Respondent's claim

In determining whether or not to enforce the doctrine of collateral estoppel, a reviewing or second court must consider whether, under the law of the original forum, that state or forum would have an interest in enforcing the collateral effect of the original judgment.[10]

Particularly under the principles of "full faith and credit" of Article IV Section 1 of the United States Constitution, the state of Nevada is the actual party, on behalf of its citizenry, which would have an interest in having the judgment of conviction given full faith and credit, and in having Judge Claiborne collaterally estopped from defending the first and second Articles of Impeachment herein.

Once again, we have the fortunate occasion, arising during the pendency of this impeachment proceeding, to know exactly the view of the Supreme Court of the State of Nevada. As evidenced by Respondent's Exhibits HEC-X-22 (report of the Senate Impeachment Trial Committee, Part IV, Page 2235) and HEC-X-27 (report of the Senate Impeachment Trial Committee, Part IV, Page 2305) now part of this record, the Nevada Supreme Court has indicated an interest in determining whether or not Judge Claiborne has been deprived of his rights to due process and a fair trial, as they specifically relate to the conviction in 1984. Accordingly, there can be no dispute that the Nevada Supreme Court would not foreclose Judge Claiborne from his defense of any claims arising by virtue of the 1984 Judgment of conviction.

In 1979, the Nevada Legislature adopted the Uniform Enforcement of Foreign Judgments Act, which is now embodied in Nevada Revised Statutes Sections 17.330 through 17.400.

The original Uniform Enforcement of Foreign Judgments Acts was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1948. *Johnson,* Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 Arl. 4th 706, 712.

NRS 17.3702 provides as follows:

"If the judgment debtor shows the court any ground upon which enforcement of a judgment of any court of this state, would be stayed, the court shall stay in enforcement of the foreign judgment, for an appropriate period, requiring the same security for an appropriate period * * *"

For reasons already stated, Judge Claiborne submits that he has provided substantial grounds upon which enforcement of the Judgment of Conviction would be stayed by any court of competent jurisdiction in the state of Nevada. Accordingly, the House of Representatives should not be permitted to offensively use the doctrine of collateral estoppel, or to in any way plead the fact of the 1984 Judgment of Conviction as basis for conviction herein under the first and second Articles of Impeachment.

---

[10] See *United States* v. *Pink,* 315 U.S. 203 (1942), 62 Sup. Ct. 553, 562; *Braselton* v. *Clearfield State Bank,* 606 Fed. 2d 285, 287 (10th Cir. 1979).

Because Judge Claiborne has raised substantial issues regarding the enforcement of the Judgment of Conviction, it is clear that no Nevada court would preclude Judge Claiborne from a full and complete hearing, in any forum that will hear him, as to the claims which are presented herein. Accordingly, summary disposition and the offensive use of collateral estoppel with respect to the First, Second, and Third Articles of Impeachment would be improper.

Conclusion

The record clearly shows that Judge Claiborne is a hard-working, no-nonsense, salt-of-the-earth individual. Former adversaries have testified that, as an attorney, and a judge, Harry Claiborne did not take short-cuts or cheap shots. Judge Claiborne's own words before this body reflect what is now at issue:

"When I came away from the courtroom I knew I had been convicted wrongfully. In my heart I knew I had not committed any violation of any laws of the United States. I began to fight to once again restore my reputation and my good name, and I appealed to every court until I ran out of remedies, and I went to prison, a place I figured I would never be.

"I had tried in the District Court every way that I could to get the Court to hear, just hear, what my government, through its agents, had done to me in the process; and the trial judge turned a deaf ear. And nobody heard it.

"I appealed to the Circuit Court of Appeals, complaining that the lower court did not hear me, and the District Court was affirmed. And I appealed by certiorari to the Supreme Court of the United States, and they denied certiorari.

"And I was hopeful that somewhere along the line that somebody would stand up and say, we want to hear what happened to this man. We want to hear. * * *

"I have been stripped of my freedom, I have been stripped of my reputation, I have been stripped of my good name and my honor.

"Now I have three grandchildren, one of which is very close to me. And I have to leave the heritage to my grandchildren, and they have stripped everything that I could leave them from me but courage.

"Maybe, after all, the best heritage that I could leave my grandchildren is the heritage of courage and guts, so at least they can say years from now, at least old grandpa had guts.

"And that is why I am here. I am continuing to fight wherever anybody will hear me. And some day, in all my heart, I will prevail. It may be after I serve my sentence in the penitentiary, and it may be years from now, but some day I will prevail, as developments every day happen in my favor like the woman's affidavit.

"Every day something happens of a tiny significant way that adds to proof that I was wrongfully convicted, and some day we will get it all. And when that day comes I just hope I have a judge that is just as fair to me as I have been to every defendant that has ever been in my court. And then I will prevail."

Judge Claiborne is asking for nothing more than an opportunity to be heard, completely, by a Court of Impeachment made up of fair and just members of the Senate.

A lyrcist of unknown identity offers this final caution to those who urge summary disposition in the name of expediency:

"Let each man learn to know himself; To gain that knowledge let him labor, Improve those failings in himself, Which he condemns so in his neighbor.

"How lenient our own faults we view, And conscience's voice adeptly smother. Yet, oh, how harshly we review the self-same failings in another!—Author unknown.

Respectively submitted,

OSCAR B. GOODMAN, Esq.[11]
Hon. HOWARD W. CANNON.
Attorneys for respondent.

---

[11] Timothy S. Cory, Esq., has contributed in large part to this pleading.

[In the Senate of the United States Sitting As a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Motion to Postpone the Hearing on Articles of Impeachment Until the Resolution of the Supplemental Section 2255 Motion by the District Court or the Ninth Circuit Court of Appeals.

The Respondent, Judge Harry E. Claiborne, through his counsel,* Oscar B. Goodman, Esq., and the Honorable Howard W. Cannon, Esq., respectfully moves the Senate to Postpone the Hearing on the Articles of Impeachment Until the Resolution of the Supplemental Section 2255 Motion by the District Court or the Ninth Circuit Court of Appeals.

This Motion is brought in the interest of developing a full and fair record for the determination of the Senate, to provide to the District Court and to the regularly constituted Ninth Circuit Court of Appeals an opportunity to consider and rule upon crucial issues involving newly discovered evidence and previously suppressed exculpatory evidence.

Respondent fully anticipates that the District Court and/or the regularly constituted Ninth Circuit Court of Appeals will determine that the newly discovered evidence and exculpatory evidence previously suppressed by the prosecution warrants a vacation of the judgment and sentence and/or a new trial.

Respondent respectfully suggests to the Senate that his exoneration in such judicial proceedings will be directly relevant to Articles I, II, III and IV of the Articles of Impeachment exhibited by the Managers.

Respectfully submitted,

Judge HARRY E. CLAIBORNE.

(By Oscar B. Goodman, Esq., Honorable Howard W. Cannon, Attorneys for Respondent.)

MEMORANDUM IN SUPPORT OF MOTION TO POSTPONE THE HEARING ON ARTICLES OF IMPEACHMENT UNTIL THE RESOLUTION OF THE SUPPLEMENTAL SECTION 2255 MOTION BY THE DISTRICT COURT OR THE NINTH CIRCUIT COURT OF APPEALS

On May 5, 1986, Respondent, Judge Harry E. Claiborne, filed his motion to Vacate Judgment and Sentence and For Evidentiary Hearing and Discovery herein before the United States District Court for the District of Nevada specifically alleging three separate grounds.

The prosecution filed their response on or about May 17, 1986. The United States District Court has not yet set that motion for hearing.

Simultaneous with the preparation of this Motion, Respondent, Judge Harry E. Claiborne has filed his Amended and Supplementary Motion (1) Vacate Sentence; (2) For Evidentiary Hearing; (3) For Discovery Proceedings; and (4) For New Trial.

The Amended and Supplementary Motion, a true copy of which is appended hereto and incorporated by reference sets forth newly discovered evidence which has become available since May 5, 1986. Much of such newly discovered evidence surfaced for the first time during the course of proceedings before the Senate Impeachment Trial Committee which convened on September 15, 1986 for the taking of testimony and evidence in this matter.

The Amended and Supplementary Motion is also based upon the Respondent's discovery of previously suppressed exculpatory evidence which was available to the Justice Department, the FBI and the IRS.

Respondent respectfully suggests to the Senate that a full and fair review of such newly discovered and/or previously suppressed exculpatory evidence in proceedings by the United States District Court for the District of Nevada and by the regularly constituted Ninth Circuit Court of Appeals, will result in a determination by such courts that it is reasonably probable that the outcome of Respondent's trial would have been different had such evidence been disclosed to the Respondent and presented at trial.

Respondent, Judge Harry E. Claiborne respectfully suggests to the Senate that such a determination by said Courts will result in the vacation of the judgments of conviction and the sentence therein and will lead to his exoneration in the regularly constituted judicial system.

---

*Michael Vaclav Stuhff, Esq., has contributed in large part to the preparation of this motion.

Respondent, Judge Harry E. Claiborne respectfully suggests to the Senate that such a disposition and exoneration by the regularly constituted judicial system will simplify any further proceedings before the Senate, will minimize any apparent conflicts between the Legislative and the Judicial Branches of government and will best serve the interests of Justice.

Respectfully submitted,

Judge HARRY E. CLAIBORNE.

(By Oscar B. Goodman, Esq., Honorable Howard W. Cannon, Attorneys for Respondent.)

[In the United States District Court for the District of Nevada, Case No. CR-R-83-57]

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARRY E. CLAIBORNE, DEFENDANT

AMENDED AND SUPPLEMENTARY MOTION

(1) TO VACATE SENTENCE;

(2) FOR EVIDENTIARY HEARING;

(3) FOR DISCOVERY PROCEEDINGS; AND

(4) FOR NEW TRIAL

Comes now the defendant, Harry E. Claiborne, through his attorney, Oscar B. Goodman, Esq. under the provisions of 28 USC Section 2255, and Rules 33 and 35 of the Rules of Criminal Procedure, respectfully supplements and amends his pending Motion (1) To Vacate Judgment and Sentence; (2) For Evidentiary Hearing; and (3) For Discovery Proceedings previously filed on or about May 5, 1986, and respectfully moves this Court for an order and judgment that the Judgment of conviction and sentence heretofore imposed upon the defendant shall be vacated and held for naught or, in the alternative, that he be granted a new trial.

In support hereof, Defendant Harry E. Claiborne states unto the Court;

1. Name and location of court which entered the judgment of conviction under attack:

United States District Court for the District of Nevada, at Reno, Nevada.

2. Date of judgment of conviction:

October 3, 1984.

3. Length of sentence:

Two (2) years.

4. Nature of offense involved (all counts):

Count IV—violating 26 USC Section 7206(1) by filing an income tax return for the year 1978 falsely reporting amount of income.

Count IV—violating 26 USC Section 7206(1) by filing an income tax return for the year 1979 falsely reporting amount of income.

5. What was your plea?

Not guilty.

6. Kind of trial:

Jury.

7. Did you testify at the trial?

Yes.

Did you appeal from the judgment of conviction?

Yes.

9. If you did appeal, answer the following:

(a) Name of Court: United States Court of Appeals for the Ninth Circuit.

(b) Result: Conviction affirmed.

(c) Date of result: July 8, 1985.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes.

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court: United States Supreme Court.

(a)(2) Nature of proceeding: Petition for writ of certiorari.

(a)(3) Grounds raised:

A. That Title III judge is not subject to criminal prosecution in advance of impeachment and removal by Congress:

B. That the Defendant should have been allowed to prove allegations that officers of the executive misused their powers to obtain the indictment of Defendant motivated by an intent to drive him from office.

C. That the trial court wrongfully withheld Jencks/Brady material.

(a)(4) Did you receive an evidentiary hearing on your petition, application or motion? No.

(a)(5) Result: Petition for a writ of certiorari was denied.

(a)(6) Date of result: Monday, April 21, 1986.

11. (b)(c)(d)(e) As to any second or subsequent petition, application or motion or appeal from action thereon, give the same information:

No second or subsequent petitions, applications or motions have been filed, except for the filing of certain motions in the United States Court of Appeals for the Ninth Circuit, filed substantially contemporaneously with the original motion herein on or about May 5, 1986.

A. Ex Parte Emergency En Banc Motion for the Designation or Assignment of a judge of the Ninth Circuit of the United States to preside over this Section 2255 motion;

B. Ex Parte Motion for Stay of Execution of Sentence.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same:

12. (A) Ground One: Conviction obtained in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution by reason of outrageous, illegal and unconscionable conduct of agents of the federal government in the commission of a pre-indictment burglary of Defendant's home and the examination and seizure (by photography) of the contents of Defendant's personal financial diary, which was utilized in obtaining Defendant's conviction.

Supporting Facts (tell your story briefly without citing cases or law):

Note: The following facts are derived from the affidavits appended to the original motion filed herein on or about May 5, 1986. Defendant was not a witness to the burglary.

At a time before the indictment was returned against defendant in approximately 1981, although the exact date will need confirmation by further investigation and discovery proceedings herein (which are hereby requested), Defendant's home at 1908 Plaza De La Cruz, Las Vegas, Nevada, was the subject of a burglary conceived and promoted by Joseph Yablonsky, then the Special Agent in Charge [hereafter SAIC] of the Las Vegas office of the Federal Bureau of Investigation [hereafter FBI].

Participants in the burglary included Stephen Rybar, then a Special Agent of the FBI; Dennis Caputo, Sergeant of the Las Vegas Metropolitan Police Office [hereafter METRO]; Clifford D. Isbell, an informant for Metro working with then Metro Commander Kent Clifford; and James D. Johnson, an associate of Isbell's, recruited by then Commander Clifford to participate in a "sting" operation with Saic Yablonsky.

The object of the burglary was to gain access to any personal financial records in Defendant's home.

FBI Special Agent Rybar searched the home and photographed a personal financial diary located there.

This diary recorded fees received by me for work performed in my private law practice after I became a United States District Judge.

Illegal access to this information provided agents of the IRS, the FBI, and the prosecution with sources of evidence with which to establish that my legal fees were underreported on income tax returns submitted by me for the tax years of 1979 and 1980.

Details of the burglary are contained in the affidavits appended to the original motion of: James D. [Daniel] Johnson and Lake Headley, an investigator, who describes the relationship of Clifford D. Isbell to then Metro Commander Kent Clifford, and statements made by Isbell regarding his participation in the burglary.

Further support for Ground One is contained in the affidavits of former Metro homicide detective and polygraph examiner, Charles Lawrence Lee and his attorney, Michael Vaclav Stuhff; the tax preparer, Jerry D. Watson; and his former assistant, Charlotte Travaglia; and private investigator Eddie LaRue, illustrating the evil animus which impelled Saic Yablonsky to direct the burglary of Defendant's home and to perform further outrageous and unconscionable acts, harmful to many other people, in his quest to achieve Defendant's conviction.

Finally, Ground One is supported by an attached copy of a grand jury subpoena served on Defendant on July 7, 1983, by Leo B. Halper, an agent of the Internal Revenue Service, seeking production of the very document which then FBI agent Stephen Rybar had photographed: "12. Personal diaries kept by you at any time between September 1, 1978 and the date of this subpoena [July 7, 1983]." (Emphasis supplied).

12. (B) Ground Two: Conviction obtained on indictment based on grand jury testimony which the prosecutor and investigating agents knew was material and was incorrect, and which the prosecutor and investigating agents refused to correct before the grand jury.

The indictment of Defendant with respect to Count VI, with spillover prejudicial effect as to Count V, was the result of the testimony of Mr. Watson before the Reno Grand Jury that Defendant had not disclosed his receipts of money in 1979 for legal services performed by Defendant before he became a federal district judge. Only the prosecutors and their agents knew that Jerry D. Watson, who is not a qualified accountant, was under the mistaken impression that "collection of accounts receivable" was not "legal fees."

The affidavits of Mr. Jerry D. Watson and Mrs. Charlotte Travaglia and the FBI 302 memorializing FBI agent Richard Jessinger's interview dated June 17, 1983 of Charlotte Travaglia (c.f. Hearings before the Senate Impeachment Trial Committee, hereinafter "Hearings", Part 3, pp. 2047-8) show that the federal prosecutor and federal investigative agents provided the indicting grand jury a false impression that Defendant had not reported all Defendant's 1979 legal fees to the tax preparer, when the prosecution knew, from the FBI 302 and follow-up interview of Charlotte Travaglia, in FBI offices, that the "yellow page" whereon such information was itemized, was authentic, and contained handwritten notations Mrs. Travaglia personally made before the preparation of the return for the tax year 1979.

Despite (or more likely because of) this knowledge, when Mr. Watson [through his attorney, Lawrence Semenza, a former United States Attorney for the District of Nevada] sought to return to the grand jury to correct his former testimony, (1) Prosecutor Shaw unreasonably demanded that Mr. Watson examine his earlier grand jury testimony in an extremely narrow time frame which Mr. Semenza thought could not possibly be done; (2) A federal agent present addressed Prosecutor Shaw in Mr. Watsons presence by directing Mr. Shaw to inform Mr. Watson that Mr. Watson was a present target of the grand jury investigation; and (3) Prosecutor Shaw then refused any access by Mr. Watson to transcripts of his former testimony.

The affidavit of Mr. Watson also serves to demonstrate the intimidating and psychologically brutal tactics employed by investigating agents in this case.

12. (C) Ground Three: The sentence was imposed illegally and in an illegal manner because, by its terms, execution of the sentence will require the Defendant, a life-tenured judge under Article III of the United States Constitution to reside elsewhere than the Federal District for which he is the judge, in violation of 28 USC Section 1334(b), which requires a judge to reside in the district for which he is appointed. Further, execution of the sentence will functionally remove defendant from his judicial office—a power reserved to Congress under its constitutional impeachment authority.

12. (D) Ground Four: The testimony of Charlotte Travaglia before the Senate Impeachment Trial Committee of the United States Senate on September 18, 1986 set forth that prior to trial on this matter, Charlotte Travaglia, mistakenly under the impression that a "subpoenaed witness for the Justice Department" which she considered herself to be, "should not talk" with the defense attorney, refused to talk fully and freely to defense counsel about her role in the preparation of Judge Harry E. Claiborne's 1980 tax return. (Hearings, Part 1, pp. 789)

The prosecutors, with full knowledge of the exculpatory nature of Mrs. Travaglia's prospective testimony, intentionally misrepresented to the defense and to at least one other witness, Jerry Watson, that Charlotte Travaglia's testimony, if elicited, would be damaging to the defendant and the prosecution intentionally, willfully and wrongfully suppressed and withheld from Judge Claiborne the exculpatory statement of Charlotte Travaglia to FBI agent Richard Jessinger, memorialized in an official FBI report, form 302 dated June 17, 1983 and transcribed on June 23, 1983. (Hearings, Part 3, pp. 2047-8)

The statement of Charlotte Travaglia to FBI agent, Richard Jessinger, assigned to procure the indictment and conviction of Judge Harry E. Claiborne, established that Judge Harry E. Claiborne made a full disclosure to his accountant of $88,500 in fees received during 1980 for legal work accomplished prior to Judge Claiborne's elevation to the bench in 1978. The issue of whether Judge Claiborne had made such a disclosure to his accountant was a critically contested issue at the trial of this matter before this Court in August of 1984.

The agents of the prosecution wrongfully withheld such information from the defense and intentionally misrepresented to the defendant's attorneys, and a witness, the tenor of Mrs. Travaglia's prospective testimony. Mrs. Travaglia, prior to trial, out of misapprehension and fear, failed and refused to disclose her prospective testimony to the defendant's attorneys. Her testimony, confirming her use and examination of the critical "yellow sheet", trial exhibit No. 41, was clearly material. It is reasonable that the disclosure of Mrs. Travaglia's statement to the defense would have led to the use of her testimony at trial and the result of the trial would have been different.

In the absence of the testimony of Charlotte Travaglia, procured through a combination of the prosecution's unconscionable suppression of her exculpatory statement, wrongful misrepresentation by prosecution agents of what her testimony would be, if offered and her misapprehension and fear of discussing the details of her prospective testimony with agents of Judge Claiborne, Judge Claiborne was unable to present crucial testimony corroborating the authenticity of the critical "yellow sheet." The "yellow sheet," trial exhibit No. 41, was wrongfully, maliciously and successfully portrayed as a recent fabrication by unscrupulous government prosecutors who knew and suppressed the truth.

IRS Agent Donald Skelton, who was irregularly designated as a grand jury agent, irregularly detailed to the Justice Department's Public Integrity Section team which targeted Judge Claiborne and who was given an unusual cash bonus of approximately $4,500.00 for his unusual and extraordinary and unethical efforts leading to the indictment of Judge Claiborne, wrongfully told another witness, Jerry Watson, "We have talked to Mrs. Travaglia and you are going to be very surprised at what she has testified to." Such statement was intended to convey and did convey the false and erroneous implication that Mrs. Travaglia had been induced to make statements incriminating Judge Claiborne. (Hearings, Vol. 3, pp. 1985)

12. (E) Ground Five: Kenneth Swanson, was interviewed by an agent of the FBI and an agent of the IRS prior to trial in this matter. (Hearings, Part 1, pp. 671, 673-674)

Kenneth Swanson, a disinterested and unbiased witness made exculpatory statements to such officers which established that the secretary to Judge Claiborne had indeed personally delivered critical documents to the offices of witness Joseph Wright. At trial in this matter, both the prosecution and this Court openly questioned and attacked the credibility of witness Judy Ahlstrom on this critical issue. Swanson also established that Joseph Wright perjured himself at trial when he denied using presigned blank tax returns. (Hearings, part 1, pp. 667)

The agents of the prosecution either wrongfully failed to memorialize this exculpatory evidence in written form in a 302 or memorandum of interview or wrongfully withheld such memorialization from this Court when presenting such materials for in camera review.

In either event, Judge Claiborne was wrongfully deprived of critical material evidence on a contested issue, the proper determination of which reasonably would have affected the verdict. The supperssion of this exculpatory interview by the prosecutor's agents undermines confidence in the outcome of the trial.

12. (F) Ground Six: The premises of accountant Joseph Wright were the subject of unusual multiple burglaries between April 11, 1980; (the date that the letter was delivered to Joseph Wright by Judy Ahlstrom) and November of 1983. (Hearings, Part 1, pp. 665-666; and Part 1, pp. 651-657)

During the course of the burglaries, in which a safe was chiseled open and a fireproof file cabinet forced open, the burglar or burglars rummaged through both locked and unlocked files, moving files from place to place, shuffling files together and, on at least one occasion, on December 24, 1980, strewed files around the floor.

During the trial of this matter, both Joseph Wright and his wife and secretary, Constance Wright, claimed that the files in their office were maintained with great care and integrity. Both of the Wrights, and the prosecution, wrongfully conveyed to the jury the false impression that the absence of the original April 11, 1980 letter from the file of Judge Claiborne could only mean that the letter had never been delivered by Judy Ahlstrom. That false and erroneous conclusion supported the prosecutor's successful argument that the April 11, 1980 letter could only be a recent fabrication.

Notwithstanding whether or not that agents of the federal government, local law enforcement agents and other cooperating with such federal agents were involved in any or all of the unusual burglaries which plagued the Wrights, the chain of custody and the presumption of the integrity of business records maintained in the normal course was destroyed.

The failure of the Wrights during direct or cross-examination to acknowledge such tampering with the files constitutes deliberate perjury on their part.

The failure of the Wrights to disclose such burglaries during the course of their testimony through the investigative processes, and two jury trials, and impeachment proceedings before a Senate Impeachment Trial Committee, prior to Joseph Wright being confronted about the previously undisclosed burglaries (during which times the Wrights repeatedly denied even the possibility that any document could have been misplaced, destroyed or removed in any fashion), seriously undermines any confidence in the propriety or integrity of the 40-50 hours of coaching of the witness by the prosecutorial team, especially since Wright, now admits to a conversation (memorialized in a previously suppressed 302 of January 4, 1983) in which he explained that certain documents were most likely "misplaced or inadvertently destroyed." (Hearings, Part 1, pp. 845-7; and Part 4, pp. 2250)

The FBI 302 memorializing said exculpatory statement was wrongfully withheld from the defense. That memorandum, like other documents sealed by the Trial Court, was not examined by the Special Panel specifically appointed to decide the appeal in this case. It was forwarded to the Senate Impeachment Trial Committee under seal, examined by the staff of that Committee, and disclosed to Judge Claiborne by order of that Committee.

The newly discovered burglaries in which files were examined, shuffled together and/or strewn on the floor, taken together with the previously withheld statements of Mr. Wright that documents "most likely had been misplaced or inadvertently destroyed", is material and undermines confidence in the outcome of the trial.

Judge Claiborne, at trial and in the Senate impeachment proceeding was required to persuade the tier of fact that a critical document had in fact been delivered. Judge Claiborne was unable to effectively account for the absence of that document from Joseph Wright's file. Judge Claiborne has maintained that Joseph Wright's perjured testimony and memory were "shaped" by the coaching of government agents over a period of at least 40-50 hours.

Once confronted with his previous statement to FBI Agent Bitterman, and confronted about the previously undisclosed burglaries, the prosecution's crucial witness, Joseph Wright, admitted to Senator Howell Heflin that he now "does not know" whether or not he received the letter of April 11, 1980. (Hearings, Part 1, pp. 847) If such an admission from this critical witness, together with the circumstances of the undisclosed exploratory burglaries, and the coaching of the witness, had been presented to the trial court, it is reasonably probable that the outcome of the trial would have been different.

12. (G) Ground Seven: During the course of the impeachment proceedings before the Senate Trial Impeachment Committee another former employee of Joseph Wright came forward with new information which, if it had been presented at trial, would probably have affected the outcome of the trial.

Ellen Arthur, who observed the Senate Impeachment Proceedings on cable T.V., discovered that there had been a factual dispute about the delivery of the April 11, 1980 letter at the trial in this matter. [In the Impeachment Proceedings, the House of Representative Managers, did not contest the credibility of Judy Ahlstrom and Judy Ahlstrom was deemed to be a truthful witness.] (Hearings, Part 1, pp. 1144-1146)

In the trial of this matter, the credibility and veracity of Judy Ahlstrom was very much placed in issue.

Unfortunately, her truthful testimony was not corroborated at trial by other witnesses such as Ellen Arthur or Kenneth Swanson. As a result, at the trials in this matter, Ms. Ahlstrom was subjected by the prosecution and on Trial Court to unnecessary humiliation and even sequestration from the defense attorney and was improperly impeached.

Ms. Ellen Arthur's affidavit (Hearings, Part 4, pp. 2077-2082; Part 1, pp. 1141-1143) and prospective testimony would have effected the outcome of the trial. The availability of this corroboration was one of the factors which influenced the Managers of the House and accept the credibility of Judy Ahlstrom.

Ellen Arthur recalls being asked to await an important delivery from Judge Claiborne's secretary to the Wright office. She recalls the delivery. She also recalls that the papers for Judge Claiborne's return were misplaced and that Constance Wright asked for help in locating them. Ellen Arthur recalled that both of the Wrights, shortly after the delivery of the April 11, 1980 letter, came into her office and searched all of her files for that letter because it had been misplaced.

Ellen Arthur's affidavit is clearly crucial new evidence which establishes perjury by the government's crucial witnesses, Joseph and Constance Wright, and which would have changed the outcome if available at the trial in this matter.

12. (H) Ground Eight: Harry E. Claiborne was the subject of an airport surveillance watch during the period that he was targeted by the FBI and its cooperating Las Vegas Metropolitan Police (Metro) Intelligence detectives.

Metro officers asssigned to the McCarran Airport Substation were instructed to report departures of Judge Claiborne as well as the destination city and the carrier.

In addition, Metro Intelligence Commander Kent Clifford ordered the installation of closed circuit camera equipment to monitor departure gates "A" and "B", the only main terminal commercial gates at the time.

Information regarding the departures of Judge Claiborne and his destination city allowed the FBI and its cooperating Metro agents and informants to choose an appropriate time to accomplish a surreptitious entry on Judge Claiborne's residence with a minimum chance of discovery and exposure.

The FBI and Metro agents would then have the benefit of information gained from such "fishing" expeditions and would be able to shield their wrongdoing if necessary by falsely claiming that the information or documents were obtained by confidential informants who had occasion to be present in Judge Claiborne's home.

12. (I) Ground Nine: Andrew Gramby Hanley, a Federally protected witness, last known to be located in the Federal Correctional Center at Sandstone, Minnesota, has given information and testimony in numerous cases leading to arrests and convictions. During the Impeachment hearings, Mr. Hanley volunteered that he had been approached by the FBI in approximately 1979 or 1980 to supply to them the floor plan of Judge Claiborne's then current residence at 500 Rancho Road in Las Vegas. The existence of such an inquiry by the FBI is relevant to this trial pursuant to Rule 404(b) establishing motive, opportunity, intent, preparation, plan, knowledge, identity (by modus operandi) or the surreptitious entry of Judge Claiborne's home by and at the direction of the FBI.

12. (J) Ground Ten: Movant, the Honorable Harry E. Claiborne is entitled to a new trial for the reason that he received ineffective assistance of counsel in violation of his rights under the Sixth Amendment. Trial Counsel retained for the tax aspects of this case was Richard Johnston of Oakland, California.

The counsel Richard Johnston, over the strenuous objection of Defendant Judge Harry E. Claiborne, refused to examine Jerry Watson in regard to Watson's claims to the Judge that two IRS employees had verified Watson's treatment of the Schedule D for the Tax year 1980.

Lack of preparation by tax counsel. The refusal of tax counsel to examine Watson as requested and demanded by Judge Harry E. Claiborne denied Judge Claiborne an adequate defense on the only counts for which any jury returned a verdict of guilty.

13. If any of the grounds listed in 12A, B, C, D, E, F, G, H, and I were not previously presented, state briefly what grounds were not so presented and give your reasons for not presenting them:

Ground One was not presented because of the following circumstances:

Information relating to the burglary became available to Defendant only after his conviction; the facts pertaining to the burglary are still coming to light. Discovery proceedings and a full evidentiary hearing are necessary and hereby requested in order to fully reveal the facts of the burglary.

The treatment of Messrs. Charles Lawrence Lee and Eddie LaRue was relied upon in pretrial proceedings seeking dismissal of the indictment for government misconduct, as to which Defendant was denied an evidentiary hearing. However, further details of those matters have only become fully available to Defendant since the United States Supreme Court denied Defendant's application for a writ of certiorari and the prosecution phase of this case was closed. For example, Charles Lawrence Lee has only recently through the FOIA/PA obtained access to portions of the 1239 pages compiled on him by unscrupulous FBI agents, including Yablonsky and unethical prosecutor Geoffrey Anderson. These matters are significant in demonstrating that the Saic Yablonsky accepted no limits to his exercise of power—not even the limits of the United States Constitution.

Ground Two was not presented at trial or on appeal because Charlotte Travaglia, was under the mistaken belief that she should not talk to the Defendant's attorney if she was a subpoenaed witness for the Justice Department. Mrs. Travaglia was fearful and reluctant to volunteer information to the defense for that reason. Mrs. Travaglia was unaware of the significance of her knowledge or prospective testimony. Her fear and misapprehension was exacerbated by her poor health.

The Defendant had no knowledge of the exculpatory FBI 302 which was wrongfully withheld from the defense. In the absence of any disclosure of such Brady material, Defendant relied on the false and misleading statements of prosecution agents that Mrs. Travaglia had been induced to provide incriminating testimony in regard to this Defendant.

Ground Three was not presented on direct appeal because during the pendency of that appeal, and the pendency of Defendant's petition to the United States Supreme Court for a writ of certiorari, the sentence was not final. A post-appeal issue is appropriate under 28 USC Section 2255 and also Rule 35(a), Federal Rules of Criminal Procedure.

Grounds Four through Ten: The information set forth in Grounds Four through Nine is information which was only revealed to Defendant, the Honorable Harry E. Claiborne, during the course of the Impeachment proceedings commencing on September 15, 1986 before the Senate Impeachment Trial Committee. This Court is requested to take judicial notice of the testimony and affidavits presented at such hearing, particularly the testimony and/or affidavits of Charlotte Travaglia, Kenneth Swanson, Richard Jessinger, Donald Skelton, Joseph Wright, Judy Ahlstrom, Ellen Arthur and the representations of counsel, Oscar B. Goodman, in regard to mid-hearing disclosures of airport surveillance of Judge Harry E. Claiborne by Metro and the FBI and in regard to the prospective testimony of Andrew Gramby Hanley.

14. Do you have any petition or appeal now pending in any court as to the Judgment under attack?

Defendant has filed in the United States Court of Appeals for the Ninth Circuit (1) Emergency en banc motion for designation of Ninth Circuit Judge; and (2) Emergency petition for stay of execution.

Petitioner has also filed in the United States Court of Appeals for the Ninth Circuit the following: (3) Original En Banc Petition for Mandamus, prohibition and quo warranto seeking the reinstatement of Defendant's appeal from his conviction and the decision of his appeal by a panel of non-recused judges randomly assigned from the Ninth Circuit; (4) Original En Banc Petition for Writ of Mandamus, prohibition and quo warranto for an order disqualifying the Honoral Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia from conducting further proceedings in any matter pertaining to this District Court case. Such motions have been addressed at 790 F.2d 1355.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: No preliminary hearing was conducted.

(b) At arraignment and plea: Oscar B. Goodman, Esquire, 520 South Fourth Street, Las Vegas, Nevada 89101

(c) At trial: Oscar B. Goodman, Esquire, 520 South Fourth Street, Las Vegas, Nevada 89101; William J. Raggio, Esquire, 1 E. First Street, #1204, Reno, Nevada 89501;

J. Richard Johnston, Esquire, 1221 Broadway, Twentieth Floor, Oakland, California 94612.

(d) At sentencing: Oscar B. Goodman, Esquire, 520 South Fourth Street, Las Vegas, Nevada 89101.

(e) On appeal: Oscar B. Goodman, Esquire, 520 South Fourth Street, Las Vegas, Nevada 89101; Annette R. Quintana, Esquire, 520 South Fourth Street, Las Vegas, Nevada 89101.

(f) In any post-conviction proceeding: Terence J. Anderson, Esquire, c/o University Coral Gables, Florida 33124; Robert S. Catz, Esquire, Cleveland Marshal College of Law, Cleveland, Ohio; Of Counsel: Oscar B. Goodman, Esquire, 520 South Fourth Street, Las Vegas, Nevada 89101.

(g) On appeal from any adverse ruling in a post-conviction proceeding: None.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes. I was sentenced on the two counts described in paragraph 4 above. The sentence on Count V was a $5,000.00 fine and a term of two (2) years imprisonment; the sentence of imprisonment on Count VI was for two (2) years, to run concurrently with the same sentence on Count V. An additional, cumulative fine of $5,000.00 was imposed on Count VI.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

No.

Wherefore, Movant-Defendant prays that the Court grant him an evidentiary hearing to establish the truth of the allegations herein contained, together with prehearing discovery proceedings, and that the judgment of conviction of Defendant be ordered vacated and held for naught because it is the product of outrageous and unconscionable behavior by federal prosecutors and agents of the FBI and the Internal Revenue Service. In the alternative Movant, the Honorable Harry E. Claiborne moves that this Court order a new trial for newly discovered evidence and because of the wrongful suppression of material exculpatory evidence by the government.

Respectfully submitted,

OSCAR B. GOODMAN, *Esquire.*

CERTIFICATE OF DEFENDANT-MOVANT

I hereby certify, under penalty of perjury, that the information contained in the foregoing motion is true and correct, except those matters contained in the affidavits appended hereto, and as to the content of those affidavits, I sincerely believe them to be true.

Dated this 1 day of October, 1986, at Las Vegas, Nevada.

OSCAR B. GOODMAN, *Esquire.*

[Affidavit]

STATE OF NEVADA, COUNTY OF CLARK, SS

I, Joseph McDonnell, having first been duly sworn, deposes and states that:

1. He retired from the Las Vegas Metropolitan Police Department on July 16, 1983, after twenty-eight (28) years' service for Metro and its predecessor agency.

2. For approximately four years preceding his retirement, he was assigned to the McCarran International Airport detail. McCarran is the commercial airport serving Clark County and Las Vegas, Nevada.

3. There were approximately twenty-six (26) commissioned officers assigned to the airport detail. Generally on any day or swing shift approximately six officers would be assigned. On any graveyard shift, approximately three officers would be assigned.

4. One of the functions of the airport detail was to monitor individuals at the request of other agencies such as the F.B.I. and out of town police agencies, and Metro Intelligence.

5. At approximately the time that there were public disclosures of the fact that a grand jury was meeting in Portland, Oregon, this affiant was requested by his immediate supervisor, Lt. Koch, to report on departures of Judge Harry E. Claiborne.

6. To the best of the affiant's recollection, Lt. Koch mentioned that Metro Sgt. Dennis Caputo was the originator of the request for surveillance. The airport detail under no circumstances "self-initiated" the surveillance of any individuals such as Judge Harry E. Claiborne.

7. On one occasion a fellow officer observed Judge Claiborne departing from McCarran. Pursuant to the previous request, I attempted to contact the F.B.I. Since it was after hours, I spoke with a duty clerk. When I did not hear back from an F.B.I. agent within approximately thirty (30) minutes. I then attempted to contact Metro Intelligence pursuant to prior instruction.

8. I was unable to contact Metro Intelligence directly because of the hour or the weekend. I then contacted Metro dispatch.

9. Sometime later two Metro Intelligence officers came to the airport in response to my report. I referred them to the fellow officer who observed Judge Harry E. Claiborne and thought nothing more of it at the time.

10. I subsequently had a brief conversation with F.B.I. Agent David Gillum, who was detailed to the airport on the cat walk outside the Metro substation at the airport in regard to my attempted report. Special Agent Gillum raised his hands in a defensive manner and said, "I'm not involved in that".

11. I am bringing this information forward now because if we were involved unknowingly in something that was wrong, I want it to be righted.

Further, affiant sayeth naught.

JOSEPH MCDONNELL.

Subscribed and sworn to before me this 1st day of October, 1986.)

[Affidavit]

STATE OF NEVADA,
County of Clark, ss:

I, Terri Lee Headley, having been first duly sworn, deposes and says that:

1. I am married to Private Investigator Lake W. Headley and been so married to my husband for approximately five years.

2. I reside with my husband at 4412 Hayes Place, Las Vegas, Nevada.

3. I have worked with my husband as a private investigator in Arizona and California, as well as Las Vegas, Nevada, doing research as necessary.

4. I have been licensed as a private investigator in Arizona and California as an employee of Lake Headley Investigations.

5. It is and has been the practice of my husband and myself to make and receive business telephone calls at our home.

6. Prior to leaving for Washington, D.C., to be present at the Senate hearings on the impeachment of Judge Harry E. Claiborne, my husband had advised me that he had made arrangements for a federally protected witness, one Andrew Gamby Hanley, to call from his unknown location to our home, collect, to discuss with my husband Hanley's role as a federal informant in the Claiborne case. My husband further advised me that Hanley had been cooperating with the F.B.I. and other law enforcement agencies for a long period of time and was considered a valued F.B.I informant. My husband also instructed me to accept any collect calls from Hanley and to relate to Hanley my husband's being in Washington, D.C., and to provide Hanley with my husband's telephone number and request that Hanley call my husband in Washington, D.C.

7. During the week of September 15, 1986, while my husband was in Washington, D.C., attending the impeachment hearings of Federal Judge Harry E. Claiborne, I received two collect long distance telephone calls from a subject who identified himself as Andrew Gramby Hanley.

8. Mr. Hanley stated that he was trying to reach my husband to relay information that he believed relevant to Judge Claiborne's case.

9. Mr. Hanley stated that this information concerned F.B.I. requests of Mr. Hanley to provide the F.B.I. with floor plans or sketches of the interior of Judge Harry E. Claiborne's home.

10. Mr. Hanley further advised me that while he was incarcerated at the present time he could receive messages through his daughter, Velicity Hanley, whose telephone number in Las Vegas is (702) 384-3062.

11. During both of my rather lengthy conversations with Andrew Gramby Hanley, he expressed his willingness to testify to the above F.B.I. requests for him to provide the information regarding the interior floor plans of Judge Claiborne's home.

Further, affiant sayeth naught.

TERRI LEE HEADLEY.

(Subscribed and sworn to before me this 1st day of October, 1986)

[In the Senate of the United States, Sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

Application for Issuance of Subpoenas for Full and Fair Impeachment Trial Before Full Senate

The Respondent, Harry E. Claiborne, by and through his counsel, Oscar B. Goodman, Esq. and the Honorable Howard W. Cannon, hereby makes application, pursuant to Rule XXV, Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, for the issuance of subpoenas, and in support thereof offers a brief synopsis regarding the area of testimony and the subject matter of testimony in order to assure Respondent a full and fair trial:

I. THE VENDETTA BY THE EXECUTIVE AGAINST JUDGE CLAIBORNE

1. Joseph Yablonsky—Address unknown. Special Agent in Charge of the F.B.I. who boasted that he would have Harry Claiborne's picture on his wall with other persons "stung" by him over the years. Professed hatred for Nevada, Nevada politicians, the Mormon Church, and intended to plant the "American flag in the Nevada desert".

2. Dan Camillo—c/o F.B.I., 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101. Special Agent of F.B.I. assigned to work out "deal" to get Joe Conforte to "deliver Harry Claiborne's head on a silver platter"; Reported directly to Yablonsky.

3. Archie Banbury—c/o I.R.S., 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101. Chief, Criminal Investigation Division, I.R.S. (Las Vegas); approved unconscionable tax settlement with Conforte at the behest of Yablonsky; Circumvented and countermanded District Director on Gerald Swanson.

4. Steven Shaw—United States Attorney's Office, Southern District of Texas. Public Integrity Attorney, who acted as investigator and prosecutor; Visited fugitive Conforte in Rio de Janeiro; Shaped witnesses testimony by threats and intimidation through 4 grand juries and 2 trials.

5. Peter Perry—P.O. Box 21510, Reno, Nevada 89515. Conforte attorney; himself charged with rape in Washington, D.C.; charges dropped when he negotiated for Conforte; Set-up his own client in order to entrap District Director Swanson, but failed to so do.

6. Joseph Conforte—c/o. Mustang Ranch, Storey County, Nevada. Panderer and procurer; Had negotiated an historically unconscionable "deal" with Yablonsky and Shaw to falsely testify against Judge Claiborne; Had sentence illegally reduced; Had reduction of taxes from $21.5 million to $3.5 million; Had habitual criminal charge dismissed; Permitted to return from fugitive status without penalty.

7. Bruce Lyons—600 N.E. 3rd Avenue, Ft. Lauderdale, Florida 33304. Attorney and President of National Association of Criminal Defense Lawyers; While in Yablonsky's presence for first time and within 5 minutes of first meeting him, is told by Yablonsky "I hate Claiborne and I'm going to get him".

8. Mills Lane, III—Washoe County Courthouse, Reno, Nevada. District Attorney of Washoe County (Reno, Nevada) who was deceived by federal executive authorities in their efforts to "cut a deal" with Conforte who faced charges with a possible penalty of a life sentence.

9. Geoffrey Anderson—U.S. Department of Justice, San Francisco, California. Department of Justice, Strike Force Chief, in Nevada. Described by Reno Federal Judge as being "schizophrenic", avowed enemy of Nevada Judiciary; it was in his office where government witnesses were debriefed in the presence of caricatures depicting Federal Judge Foley as a clown, and Judge Claiborne as the "Ayatollah".

10. James Perry—c/o F.B.I., Washington, D.C. F.B.I. Agent in Las Vegas; right hand man to Yablonsky; coordinator of Claiborne investigation.

II. "STINGS" TO ENSNARE JUDGE CLAIBORNE

1. Eddie LaRue—1105 South Eighth Street, Las Vegas, Nevada 89101. Private investigator indicted for illegal wiretapping before being acquitted after being prosecuted by Public Integrity lawyers, was told he would get 25 years in prison if convicted, but could have charge dismissed if he testified against Judge Claiborne.

2. Andrew Reich—U.S. Department of Justice, Washington, D.C. Public Integrity lawyer who prosecuted LaRue case, even though prosecution was outside the scope of Section's responsibilities; threatened LaRue, supra.

3. Gerald Swanson—c/o Internal Revenue Service, Dallas, Texas. Nevada District Director of I.R.S.; would not approve Yablonsky request to reduce Conforte taxes; targeted for "Yablonsky-type" "sting"; the "sting" fails, but he is demoted to field office and transferred from his home in Nevada to Texas.

4. Chuck Lee—Clark County District Attorney's Office, 200 E. Carson, Las Vegas, Nevada 89101. Former Las Vegas Metropolitan Police Department Officer who administered polygraph test at Judge Claiborne's request; when F.B.I. discovered that test results indicated Judge Claiborne was truthful, pressure was placed on Lee, he was targeted by F.B.I., and subsequently demoted.

5. Richard Wright—302 E. Carson, Suite 620, Las Vegas, Nevada 89101. An attorney in Las Vegas who represented Floyd Lamb, Nevada State Senator; Wright was advised that if Lamb would provide information against Judge Claiborne and other Nevada politicians, criminal charges then pending against Lamb would be dismissed; Wright advised authorities Lamb could not provide such information.

6. Paul Ashe—P.O. Box 1986, Ocala, Florida 32678. Attorney from Florida under Nevada indictment; former secretary was Joe Yablonsky's ex-wife; Ashe was told by Yablonsky that Ashe should attempt to bribe Judge Claiborne who was presiding over Ashe's case, either directly to Judge Claiborne or through Ashe's attorney, Oscar B. Goodman; Ashe refused.

7. Ron Veatch—Address Unknown. A convicted felon who was contacted while in custody and promised relief if he would participate in a bribe of Judge Claiborne as it related to certain motions filed in the Nevada Courts; Veatch declined.

8. Walter Rozanski—10416 Connechusett, Tampa, Florida 33617. A probationer in Las Vegas, whose probation officer was contacted by the F.B.I.; after the contact the probation officer threatened Rozanski with probation revocation if Rozanski refused to testify that Judge Claiborne acted as an intermediary where monies were allegedly passed to assure Rozanski's receiving probation; Rozanski refused, stating that such was not the case.

II. ILLEGAL BREAK-IN TO JUDGE CLAIBORNE'S HOME

1. Andy Gramby Hanley—c/o F.C.I. Sandstone, Sandstone, Minnesota 55072. A federally protected witness; Hanley was contacted in 1980 or 1981 by F.B.I. Agent John Bailey and asked to provide a floor plan to Judge Claiborne's home.

2. Joseph McDonnell—4724 Casitas Way, Las Vegas, Nevada. A former Las Vegas Metropolitan Police Department Officer, assigned to the Intelligence Detail at Las Vegas McCarran Airport, who was instructed to advise his superiors and the F.B.I.

any time Harry Claiborne departed from Las Vegas, providing the time, airline and destination of the departure.

3. Lake Headley—300 South Fourth Street, Suite 600, Las Vegas, Nevada 89101. A private investigator who assembled information concerning the break-in of Judge Claiborne's home, wherein evidence consisting of a personal financial diary was copied, and which provided the basis for the tax prosecution of Judge Claiborne; Headley interviewed Cliff Isbell, one of the alleged perpetrators of the burglary.

4. Cliff Isbell—c/o Lake Headley, 300 South Fourth Street, Suite 600, Las Vegas, Nevada 89101. A longtime petty criminal, who acted as an informant for the Intelligence Division of the Las Vegas Metropolitan Police Department; admitted to the burglary of the Judge's home.

5. James Johnson—c/o Lake Headley, 300 South Fourth Street, Suite 600, Las Vegas, Nevada 89101. A convicted felon who has provided an affidavit under oath that he participated in the break-in of Judge Claiborne's home with representatives of the F.B.I., Las Vegas Metropolitan Police Department and Cliff Isbell.

6. Dennis Caputo—c/o Las Vegas Metropolitan Police Department, 430 E. Stewart Avenue, Las Vegas, Nevada 89101. A Las Vegas Metropolitan Police Department Officer who allegedly participated in the break-in of the Claiborne residence; allegedly he received a large monetary reward for this activity.

7. Steven Rybar, 11165 Forestview Lane, San Diego, California 92131. A former F.B.I. Agent, identified by burglar James Johnson, as being a participant in the Claiborne burglary.

III. EXECUTIVE OVER-REACHING AND TAMPERING WITH WITNESSES

1. Richard Jessinger—c/o F.B.I., Foley Federal Building, 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101. Las Vegas F.B.I. Agent responsible at a field level for Claiborne investigation; he failed to follow internal regulations concerning the preparation of F.B.I. Form 302 memoranda. .

2. Donald Skelton—c/o I.R.S., Foley Federal Building, 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101. An I.R.S. Agent who donned the role of an "agent of the Grand Jury", was detailed to the Public Integrity Section, and spent over 50 hours shaping the testimony of the key prosecution witness on the preparation of the 1979 tax return, Joseph Wright; established a fraternal relationship with Wright and took advantage of Wright's inability to have a "present recollection" about any of the facts; was awarded $4,500 for his participation in the Claiborne investigation; violated every I.R.S. regulation concerning the preparation of memoranda memorializing witness interviews.

3. Leo Halper—c/o I.R.S., Foley Federal Building, 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101. I.R.S. Agent who threatened key witness on the preparation of the 1980 tax return, Jerry Watson, after Watson was advised that he was a "target" of the Grand Jury; attempted to chill Watson's relationship with Watson's attorney; used foul and abusive language during the time the threats to Watson were made.

4. William Hendricks—c/o Public Integrity Section, U.S. Department of Justice, Washington, D.C. Public Integrity attorney involved in Judge Claiborne's prosecution; awarded the John Marshall Award as Prosecutor of the Year for his participation in the Claiborne case; furnished no exculpatory information to the defense notwithstanding his knowledge of the same.

IV. JUDICIAL FEAR OR INDIFFERENCE

1. Honorable Walter Hoffman—c/o U.S. District Court, Norfolk, Virginia. Judge from Norfolk, Virginia, specially solicited to preside over Grand Jury and trial matters concerning Judge Claiborne; failed or refused to examine exculpatory materials, thus depriving Judge Claiborne of his opportunity to a full defense.

2. Honorable John L. Smith—c/o United States Courthouse, Washington, D.C. Federal judge in the District of Columbia who participated in an illegal reduction of Conforte's sentence at the behest of the Justice Department.

3. Honorable Wilbur F. Pell—c/o Seventh Circuit Court of Appeals. Senior Judge of the Seventh Circuit Court of Appeals, specially designated to preside over Judge Claiborne's direct appeal, in contravention of established rules in the Ninth Circuit Court of Appeals; refused and/or failed to review sealed pleadings which contained exculpatory material so vital to Judge Claiborne's defense.

4. Honorable J. Edward Lumbard—c/o Second Circuit Court of Appeals. Senior Judge of the Second Circuit Court of Appeals, specially designated to preside over Judge Claiborne's direct appeal, in contravention of established rules in the Ninth

Circuit Court of Appeals; refused and/or failed to review sealed pleadings which contained exculpatory material so vital to Judge Claiborne's defense.

5. Honorable Robert H. McWilliams—c/o Tenth Circuit Court of Appeals. Senior Judge of the Tenth Circuit Court of Appeals, specially designated to preside over Judge Claiborne's direct appeal, in contravention of established rules in the Ninth Circuit Court of Appeals; refused and/or failed to review sealed pleadings which contained exculpatory material so vital to Judge Claiborne's defense.

6. Honorable Warren Ferguson—c/o Ninth Circuit Court of Appeals. Judge, Ninth Circuit Court of Appeals, in whose dissent to Judge Claiborne's request for rehearing en banc, it was disclosed that no Judge ever reviewed the sealed material which contained exculpatory information for Judge Claiborne.

7. Honorable Stephen Reinhardt—c/o Ninth Circuit Court of Appeals. Judge, Ninth Circuit Court of Appeals, in whose dissent on Judge Claiborne's petition for rehearing en banc, was acutely critical of the manner in which the Judiciary was assigned to hear aspects of the Claiborne case, finding the precedures to be improper.

V. PREPARATION OF 1979 TAX RETURN

1. Joseph Wright—333 North Rancho Drive, Las Vegas, Nevada 89106. The tax preparer of the 1979 return; he had no present recollection at any of the proceedings involving Judge Claiborne as to what he was testifying; he perjured himself in denying that he did not receive a letter of 4/11/80 wherein Judy Ahlstrom made full disclosure to him, for purposes of tax preparation, of the income received as a result of monies earned while the Judge was in private practice; failed to advise during any proceedings that his office had been the object of numerous burglaries.

2. Judge Ahlstrom—2803 Iris Court, Henderson, Nevada 89015, or Foley Federal Building, 300 Las Vegas Blvd. South, Las Vegas, Nevada 89101. Judge Claiborne's secretary who delivered the aforementioned letter of 4/11/80 to Wright's office, together with the Judge's W-2 and a check in the amount of $8,000 made payable to the I.R.S., which check was received by the I.R.S. in its normal course.

3. Annette R. Quintana—c/o 520 South Fourth Street, Las Vegas, Nevada 89101. A former Claiborne associate who provided parallel information to Wright's office which would have dove-tailed with the information provided to that office by Judge Claiborne, regarding the fees earned in private practice.

4. Kenneth Swanson—A Wright employee who confirmed that Judy Ahlstrom in fact made a delivery to Wright's office on 4/11/80; and who disclosed numerous burglaries of Wright's office during the time that the Justice Department was investigating Judge Claiborne's affairs; he also was cognizant of Wright's practice, which Wright denied, of permitting taxpayers to sign their returns in blank.

5. Ellen Arthur—3745 Manhattan, Apt. 86, Las Vegas, Nevada 89109. A former Wright employee who received the envelope from Judy Ahlstrom on 4/11/80 and placed the same on Wright's desk; she was later queried by Mrs. Wright as to the whereabouts of the papers since they appeared to have been lost or mislaid.

VI. PREPARATION OF 1980 TAX RETURN

1. Jerry Watson—1700 E. Desert Inn Road, Las Vegas, Nevada 89109. An entrepreneur who represented himself to professional and business people in the Las Vegas community as being a master of all trades; he assumes full responsibility for the document filed as the "purported" tax return of Judge Claiborne; he is knowledgable about Judge Claiborne's true and complete disclosure of fees earned from private practice in the sum of $88,500.

2. Charlotte Travaglia—A former Watson employee who participated in the working up of Judge Claiborne's return; she was cognizant of the full and complete disclosure by Judge Claiborne of the $88,500 but never discussed how the same should be treated on the Judge's return, and in fact never had any discussion with Judge Claiborne about anything; she disputes with Watson who decided to treat the income as accounts receivable on the Schedule "D".

3. Peggy Kotecki—A former Watson employee who, in the preparation of Judge Claiborne's 1981 return, treated income received on Schedule "D" as well.

4. Noriko Lowe—A former I.R.S. Agent with whom Watson discussed the propriety of Judge Claiborne's 1980 tax return, and who indicated that it certainly would not be the subject of a criminal prosecution.

5. Lawrence Semenza—560 E. Plumb Lane, Reno, Nevada 89510. An attorney who represented Watson at the Grand Jury, who overheard the threats and observed the abuse Watson received as a result of Shaw and Skelton's actions.

6. Clyde Maxwell—567 San Nicolas Drive, Suite 208, Newport Beach, California 92660. A former Justice Department prosecutor in the Tax Division whose opinion was that the Claiborne returns should have been subjected to civil, rather than criminal, process.

VII. CHARACTER AND BACKGROUND WITNESSES

1. H.M. Greenspun—121 S. Highland Drive, Las Vegas, Nevada 89106. The publisher of the Las Vegas Sun who was intimately involved in the investigative reporting of the entire Claiborne matter; who was cognizant of a Justice Department vendetta and coverup.
2. Peter Echeverria—555 South Center Street, Reno, Nevada 89501. A former Chairman of the Nevada Gaming Commission whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
3. Edward Kane—300 South Fourth Street, Suite 600, Las Vegas, Nevada 89101. A former prosecutor who appeared before Judge Claiborne, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
4. Lorraine Luke—c/o Sahara Hotel, Security Podium, 2535 Las Vegas Blvd. South, Las Vegas, Nevada 89109. A former court clerk to Judge Claiborne, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
5. Brad Gerbic—200 South Third Street, Seventh Floor, Las Vegas, Nevada 89155. A former law clerk of Judge Claiborne's, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
6. Mike O'Callaghan—200 South Third Street, Seventh Floor, Las Vegas, Nevada 89155. A former law clerk of Judge Claiborne's, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
7. Eugene Sadoian—7900 Martingale Lane, Las Vegas, Nevada 89119. Former Chief of United States Department of Parole and Probation, Las Vegas, Nevada, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
8. Leland Lutfy—233 South Fourth Street, Las Vegas, Nevada 89101. A former prosecutor who appeared before Judge Claiborne, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
9. Daniel Markoff—330 South Third Street, #1050, Las Vegas, Nevada 89101. Present Public Defender for the District of Nevada, Las Vegas, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
10. Eileen Brookman—Former State Assemblywoman in Nevada, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.
11. Tim Corey—515 South Third Street, Las Vegas, Nevada 89101. A former law clerk of Judge Claiborne, whose opinion of Judge Claiborne's character trait of honesty and integrity was excellent.

Each of the above former employees of Judge Claiborne would testify that he had relied upon them, trusted them and placed a great deal of confidence in whatever work product they participated in preparing.

VIII. THE HONORABLE HARRY E. CLAIBORNE

Respectfully submitted:

HARRY E. CLAIBORNE.

(By Oscar B. Goodman, Esq., and Honorable Howard W. Cannon, Attorneys for Respondent.)

[Congressional Record—October 6, 1986—S 15279]

ORDERS FOR TUESDAY, OCTOBER 7, 1986

RECESS UNTIL TOMORROW AT 9 A.M.

Mr. SIMPSON. Mr. President, after conferring with the acting Democratic leader, I ask unanimous consent that once the Senate completes its business today, it stand in recess until the hour 9 a.m. on Tuesday, October 7, 1986.

The PRESIDING OFFICER. Without objection, it is so ordered.

ROUTINE MORNING BUSINESS

Mr. SIMPSON. Mr. President, following the recognition of the two leaders under the standing order, I ask unanimous consent that there be a period for the transaction of routine morning business, not to extend beyond the hour of 9:30 a.m., with Senators permitted to speak therein for not more than 5 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

DELIBERATION OF THE ARTICLES OF IMPEACHMENT

Mr. SIMPSON. Mr. President, at 9:30 a.m., a live quorum call will begin in order to establish the presence of a quorum. Following the establishment of a quorum, the Senate will begin its deliberation of the articles of impeachment against Harry E. Claiborne, a judge from the U.S. District Court for the District of Nevada.

The Senate will continue its consideration of the impeachment until 1 p.m. At 1 p.m., the Senate will stand in recess until the hour of 2 p.m. in order for the weekly party caucuses to meet.

At 2 p.m., the Senate will resume consideration of the articles of impeachment.

Votes can be expected during Tuesday's session of the Senate.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SIMPSON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

COURT OF IMPEACHMENT SCHEDULE

Mr. SIMPSON. Mr. President, the Senate sits tomorrow morning, Tuesday, October 7, at 9:30 a.m., as a court of impeachment, a very important proceeding and the distinguished majority leader and distinguished minority leader have discussed the importance of the attendance of Members. To promote attendance it is the intention of the leadership to begin the proceedings tomorrow with a live quorum.

I would like to just briefly identify the matters we will take up tomorrow.

The Senate will hear the argument on several motions tomorrow. The Senate's disposition of these motions will determine whether the Senate will hear closing arguments tomorrow afternoon and deliberate on its verdict on Wednesday or whether other proceedings will occur.

All of the motions which the Senate shall hear tomorrow are motions by Judge Claiborne. The House is no longer asking the Senate to decide any House motions in advance of the Senate's deliberation on the articles. The House is prepared to go directly to closing argument based on the record compiled before the Senate Impeachment Trial Committee.

One motion which will be argued tomorrow is Judge Claiborne's motion to postpone the consideration of the Articles of Impeachment. The motion to postpone was distributed to each Member last Thursday, October 2, and was reprinted in the Congressional

Record that day. The motion asked that the Senate delay its consideration of the articles until the District Court for the District of Nevada or the Ninth Circuit Court of Appeals resolves Judge Claiborne's motion for a new trial.

Judge Claiborne's counsel will also argue that the Senate must hear witnesses in open Senate rather than utilize the evidentiary record compiled by the Senate Impeachment Trial Committee. Judge Claiborne has also moved before the committee to declare Senate impeachment rule XI unconstitutional. His motion and memorandum, and the House opposition to the motion, are reprinted in part I of Senate Hearing Report 99-812. The committee referred that motion to the Senate. Also, last Thursday Judge Claiborne filed a motion styled "supplemental motion for full and fair impeachment trial before the entire Senate of the United States, or in the alternative for dismissal," and also an application for more than 50 subpoenas. The new motion and application were also distributed to Members on October 2 and reprinted in the Record on that day. The issue which the Senate is being asked to consider is whether the record of testimonial and documentary evidence which has been reported by the committee is a constitutional and sufficient basis for the Senate's deliberation on the articles.

The House has filed response to these motions today.

Judge Claiborne's counsel also proposed to argue tomorrow in support of a motion that the Senate establish that the burden of proof in this impeachment is proof beyond a reasonable doubt. This motion had been submitted to the committee and was referred by it to the Senate. The motion and the House opposition to it are reprinted in part I of Senate Hearing Report 99-812.

I send to the desk a unanimous-consent request, on the scheduling of these proceedings, which I ask the clerk to read.

ORDER EXTENDING ROUTINE MORNING BUSINESS FOR AN ADDITIONAL 15 MINUTES

The PRESIDING OFFICER. The Chair would note that the time for morning business has expired.

Mr. SIMPSON. Mr. President, I ask unanimous consent that the time for morning business be extended an additional 15 minute period.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will read.

The legislative clerk read as follows:

Ordered, That on Tuesday, October 7, 1986, at the hour of 9:30 a.m., the Senate proceed as a court of impeachment.

Ordered further, That after the ascertainment of a quorum, after which during the sessions of the Senate as a court of impeachment the Chair is authorized to ascertain the presence of a quorum, there be 2 hours, equally divided between the managers on the part of the House of Representatives and the counsel on the part of the respondent, for argument on pending motions: *Provided,* That notwithstanding the provisions of S. Res. 28, the television cameras shall be permitted to focus on any person speaking.

Ordered further, That at the conclusion of the argument on motions, the Senate proceed in closed session until no later than the hour of 1:00 p.m. for deliberation on the motions.

Ordered further, That the Senate stand in recess between the hours of 1:00 and 2:00 p.m.

Ordered further, That upon the reconvening of the Senate at 2:00 p.m., the motions be disposed of.

Ordered further, That if, upon its disposition of the motions, the Senate determines that it is ready for final arguments, the Senate shall proceed to hear final arguments with the time until no later than 6:00 p.m. equally divided between the managers on the part of the House of Representatives and the counsel for the respondent, or the respondent himself: *Provided,* That the final arguments shall be opened and closed by the House of Representatives as provided in Senate impeachment rule 22.

Ordered further, If under the previous provisions of this order, the Senate has heard closing arguments on Tuesday, October 7, 1986, then on Wednesday, October 8, 1986, at the hour of 9:30 a.m., the Senate shall proceed in closed session to deliberate upon the articles of impeachment, and upon completion of its deliberations the Senate shall proceed to a vote.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

[Congressional Record—October 7, 1986—S 15481]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

COURT OF IMPEACHMENT

The PRESIDING OFFICER. Under the previous order, the hour of 9:30 having arrived, the Senate will now proceed as a court of impeachment, and the Sergeant at Arms will make the proclamation.

The Sergeant at Arms, Ernest E. Garcia, made proclamation as follows:

All persons are commanded to keep silent on pain of imprisonment while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Judge Harry E. Claiborne.

CALL OF THE ROLL

Mr. MCCLURE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll and the following Senators answered to their names:

[Quorum No. 14]

Armstrong
Broyhill
Chiles
Dole
Eagleton
Gore
Gramm
Grassley
Hatfield
Hecht
Johnston
Kerry
Mathias
Mattingly
McClure
Proxmire
Pryor
Simon
Stevens

The PRESIDING OFFICER. A quorum is not present. The clerk will call the names of the absent Senators.

The legislative clerk resumed the call of the roll, and the following Senators entered the Chamber and answered to their names:

Abdnor
Andrews
Baucus
Bentsen
Bingaman
Boren
Bumpers
Burdick
Byrd
Chafee
Cochran
Cohen
Cranston
D'Amato
Danforth
DeConcini
Dixon
Dodd
Domenici
Durenberger
Evans
Exon
Ford
Glenn
Gorton
Gramm
Hart

Heflin
Heinz
Hollings
Humphrey
Inouye
Kassebaum
Kennedy
Lautenberg
Laxalt
Leahy
Levin
Lugar
Matsunaga
McConnell
Melcher
Metzenbaum
Mitchell
Moynihan
Nickles
Nunn
Packwood
Pell
Pressler
Quayle
Riegle
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Simpson
Stafford
Stennis
Thurmond
Trible
Wallop
Warner
Wilson
Zorinsky

Mr. Simpson. I announce that the Senator from Minnesota [Mr. Boschwitz], the Senator from Alabama [Mr. Denton], the Senator from Utah [Mr. Garn], the Senator from Arizona [Mr. Goldwater], the Senator from Utah [Mr. Hatch], the Senator from Florida [Mrs. Hawkins], the Senator from North Carolina [Mr. Helms], the Senator from Wisconsin [Mr. Kasten], the Senator from Alaska [Mr. Murkowski], the Senator from Pennsylvania [Mr. Specter], the Senator from Idaho [Mr. Symms], and the Senator from Connecticut [Mr. Weicker] are necessarily absent.

Mr. Cranston. I announce that the Senator from Delaware [Mr. Biden], the Senator from New Jersey [Mr. Bradley], and the Senator from Louisiana [Mr. Long] are necessarily absent.

The Vice President. The Senate will be in order. A quorum is present.

The majority leader is recognized.

PRIVILEGE OF THE FLOOR

Mr. Dole. Mr. President, I ask unanimous consent that floor privileges during the impeachment proceedings of Judge Harry Claiborne be granted to the individuals noted below:

SENATE IMPEACHMENT TRIAL COMMITTEE STAFF

Michael Davidson, Senate legal counsel, counsel.

Floyd M. Riddick, Senate Parliamentarian Emeritus, consultant.

John B. Childers, staff director, Senate Rules Committee, staff director.

William McW. Cochrane, Democratic staff director, Senate Rules Committee.

Anthony L. Harvey, professional staff member, Senate Rules Committee, clerk.

Byron Hoover, staff assistant, Senate Rules Committee, assistant clerk.

Carole J. Blessington, assistant chief clerk, Senate Rules Committee, staff assistant.

Gerald R. Gereau, chief investigator, Senate Rules Committee, security coordinator.

MANAGERS OF THE HOUSE OF REPRESENTATIVES

Hon. Peter W. Rodino, Jr.
Hon. Robert W. Kastenmeier.
Hon. Romano L. Mazzoli.
Hon. William J. Hughes.

Hon. Dan Glickman.
Hon. Hamilton Fish, Jr.
Hon. Henry J. Hyde.
Hon. Thomas N. Kindness.
Hon. Michael DeWine.

HOUSE MANAGERS STAFF

Nicholas D. Chabraja, special counsel.
David W. DeBruin, associate special counsel.
M. Elaine Mielke, general counsel.
Alan F. Coffey, Jr., associate counsel.

JUDGE CLAIBORNE'S REPRESENTATIVES

Oscar B. Goodman.
Hon. Howard W. Cannon.
David Chesnoff.
Michael Stuhff.
Timothy Cory.
Linda Rogers.
Allan Cannon.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. DOLE. Mr. President, I ask unanimous consent that Michael Davidson, John B. Childers, and Gerald R. Gereau, staff members of the Senate Impeachment Trial Committee; and Ernest E. Garcia, Sergeant at Arms; Sheila Burke, chief of staff to the majority leader; Pete Velde, Judiciary Committee; and Charles Kinney, Democratic Policy Committee, be authorized to be present when the Senate goes into executive session during the impeachment proceedings of Judge Harry E. Claiborne.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. DOLE. Mr. President, first, let me indicate that I hope absent Members will come to the Senate floor. I know there are a number of conferences taking place, but this is an important matter. I urgently request our colleagues on both sides to come to the Senate Chamber.

Mr. President, on August 14, 1986, the Presiding Officer, pursuant to Senate Resolution No. 481, appointed a committee of 12 Senators to perform the duties provided for by rule XI of the Rules of Procedure and Practice of the Senate When Sitting on Impeachment Trials. On the recommendation of the majority leader, the Presiding Officer appointed Senators Mathias, Hatch, Warner, Rudman, Pressler, and McConnell to be members of the committee. On the recommendations of the distinguished minority leader, the Presiding Officer appointed Senators Sarbanes, Heflin, DeConcini, Pryor, Gore, and Bingaman to be members of the committee.

The committee held an organizational meeting on August 15 and elected the distinguished Senators from Maryland [Mr. Mathias and Mr. Sarbanes] to be chairman and vice chairman respectively. The committee heard pretrial arguments on September 10 and September 15 and heard testimony for 7 days, beginning on the 15th and ending on the 23d of September. The committee heard testimony from three witnesses who were called by the House of Representatives and from 16 witnesses who were called by Judge Claiborne. Judge Claiborne testified on his own behalf over the course of 3 days. Witnesses were subject to examination and cross-examination by the managers on behalf of the House or their counsel and by counsel for Judge Claiborne. Witnesses were also questioned by members of the committee.

The proceedings before the committee have been printed in Senate Hearing Report No. 99-812. The committee filed a report on October 1, 1986, Senate Report No. 99-511, which certified, in accordance with Senate Impeachment Rule XI, that the hearing report is a transcript of the proceedings and testimony given before the committee.

It is my understanding now that the committee has reported to the Senate that the evidence and testimony received by the Senate from the committee, in the words of rule XI, "shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality as having been received and taken before the Senate.* * *" Will the Presiding Officer advise the Senate whether this is correct?

The VICE PRESIDENT. The majority leader is correct. The Senate has received the report of the committee appointed under Senate Impeachment Rule XI. In accordance with the rule, the evidence and the testimony which the committee has reported is considered in its impeachment trial to all intents and purposes as having been received and taken before the Senate. The receipt of this documentary evidence is subject to the right of the Senate to determine competency, relevancy, and materiality. Rule XI also provides that nothing in the rule prevents the Senate from sending for any witness and hearing that witness's testimony in open Senate, or by order of the Senate having the entire trial in the open Senate.

In accordance with the unanimous-consent order of yesterday, each side is allocated a total of 1 hour in the aggregate for the argument of all motions this morning. Managers on their side and counsel for Judge Claiborne on his side may allocate the portion of this hour which each wishes to devote to each motion as long as the total time for each side does not exceed 1 hour. Although the rules provide that all motions shall be addressed to the Presiding Officer, we have provided that counsel may face the full Senate during their presentations. Also, as Members of the Senate are aware, in accordance with Senate Impeachment Rule XIX, any questions which Members may wish counsel to address during their arguments shall be reduced to writing and put by the Presiding Officer.

Counsel for Judge Claiborne, Mr. Goodman, will now be heard on his motion for a postponement. Mr. Goodman.

MOTION FOR POSTPONEMENT

Mr. GOODMAN. Mr. President, House Managers, Judge Claiborne, Senator Cannon, Mr. Chesnoff, Mr. Stuhff, esteemed Members of the U.S. Senate:

Moments ago I had the privilege of shaking the hands of the most powerful men in the world, the leaders of a country that has been founded on principles which go back some 200 years by the Founding Fathers and the framers of the U.S. Constitution. Within the past month, I had the privilege of appearing before 12 members of a committee assembled pursuant to rule XI of the Rules of Impeachment and had the opportunity to witness their incisive examination of the various witnesses who were brought before them in their assignment to gather evidence which would be presented to this esteemed body.

These 12 gentlemen conducted themselves in a manner which makes me proud as an American citizen because they set out to the best of their ability to perform their function in a manner which was meaningful to serve the citizenry of the United States as well as my client, an Article III Federal judge—a separate branch of the Government—giving him every courtesy to which he was entitled as a member of that separate branch and every consideration in the way they conducted themselves in receiving the evidence.

The reason I am making these prefatory remarks is I believe, when we entered the rule XI committee meeting, we entered with that group of Senators expecting that their decision, although not to be reported to the Senate but as far as their own personal belief was concerned, was foregone that Judge Claiborne was in fact guilty and should be impeached because of the fact that he is a sitting Federal judge who is presently incarcerated drawing his salary in a prison in Montgomery, AL. That is not a popular position to postulate before those who are your judge, who have to make a political determination and report to their constituents as to why they are going to engage in a particular act, and particularly after a full and fair hearing before the Senate they would acquit Judge Claiborne. It is very difficult to explain that to the average citizen because the average citizen does not want to accept that type of verdict based on the fact that the man is in prison and has been convicted.

But the beautiful part about this country and about the fact that the impeachment proceedings are autonomous from the court proceedings is that an Article III judge such as Judge Claiborne is entitled to a separate, autonomous ruling as far as his position is concerned. And Judge Claiborne does not like to be sitting where he is before the leaders of this country, gentlemen who he all respects. It is not pleasant; he is subject to ignominy; he is subject to scorn, and perhaps it would have been a lot easier for some other man to have given up his position, to have forfeited his salary, and to go on to another day. But the reason that Judge Claiborne does not do this—and this is what the American public has to know in this national inquest, because that is what an impeachment proceeding is all about. They must understand that Judge Claiborne is pursing his remedies pursuant to the impeachment process for two reasons and two reasons alone.

First, he sincerely believes deep down within his inner body and his soul that he is innocent, that he has committed no willful violation, that he has engaged in no high crime or misdemeanor but, rather, is a victim of circumstances where he has not before the last 2 weeks been able to even put forth the beginning essence of why, of what, or how things happened.

The second reason that Judge Claiborne is sitting before this esteemed body is because he has been caught in the vortex of a constitutional crisis, a situation that has to affect every Member of this body because, God forbid, it could happen to them, where Judge Claiborne became victimized as a result of a vendetta of the Justice Department and the strike force and a special agent in charge of the FBI, who came to the Nevada desert to bury the American flag and vowed that he would put Judge Claiborne's picture on his wall as he had other criminals throughout his career as an FBI agent. That is the reason Judge Claiborne is before you today. That is the reason he has not resigned. That is the reason you gentlemen owe him, and I say that respectfully, the obligation to judge him fairly, to judge him impartially, to not rush to judgment but, rather, to give him every consideration to which he is entitled as an American citizen and an article III judge.

I said those remarks so you could get some flavor as to why the man is here. He is asking for consideration, at first, to postpone these proceedings.

After the trial—and there were two trials which took place in Reno, NV—Judge Claiborne discovered that he was a victim of a burglary of his premises, where we maintain certain items and personal effects were taken and photographed and utilized against him in his prosecution. If he is correct, under the exclusionary rule, which is a judicially fashioned rule, he could very well be entitled to suppression of the evidence and exoneration and acquittal of the matters upon which he stands convicted.

In addition to that, because of the fact this was a public inquest and it was televised to the American public in the past several weeks, witnesses have come forward, bringing information to us, which we never had before, which could change the entire structure of the Claiborne conviction.

On the date that we served the motions in this particular action, we filed in the U.S. District Court for the District of Nevada a motion for a new trial, styling it a motion under 2255 of the Federal Rules—in effect, a writ of habeas corpus. In that motion, we brought forward the new proofs that have emerged, which go to the very issues which were litigated not only in the courts but which were expressed and brought forward before the rule XI committee.

I do not know whether you gentlemen have had the opportunity to read the volumes of transcripts which cover some 7 days of taking testimony. I hope that you did, because, in my opinion, in my humble opinion, you would have to do that in order to effectively resolve certain matters which must be decided today. It would not suffice, as far as giving Judge Claiborne a full and fair hearing of all the matters, to have just read it, because you would not have had the opportunity to judge the demeanor of the witnesses, in order to ascertain whether or not they were credible. But, nevertheless, to understand the background of the Claiborne situation, a reading of these transcripts is necessary.

But as a brief precis as to what the underlying allegations which Judge Claiborne defended against, I would submit that you should understand he is being charged with signing tax returns for years 1979 and 1980 where there is some material misstatement within the return; and the legal theory upon which he was prosecuted, both in court as well as the legal theory which the House managers have taken upon themselves to prove, was that he engaged in such activity willfully and knowingly.

Now, the briefs which have been posited for your perusal defined "willfully and knowingly." Depending on which side you are advocating, you would take the position that "willfully" either means with bad purpose or, from the House perspective, knowing that you have a legal obligation and intentionally violating that obligation.

The 1979 return--and it is so difficult within the time constraints that I have to attempt to educate you just briefly as to what this is all about—but the 1979 return was prepared by a public accountant—not a CPA, but a public accountant who had been grandfathered in—with whom Judge Claiborne had been doing business for many, many years when Judge Claiborne was in private practice and had a law business, in effect, to run, and then carried over when Judge Claiborne was appointed to the Federal bench on September 1, 1978.

The key which was agreed upon both at the time of the trial as well as inferentially or implicitly agreed upon as the issue which was before the committee under rule XI, as far as the relevance and materiality of the witnesses that were coming forward, were as to whether or not, in signing that return, which the judge signed in blank, he engaged in willful activity.

The essence of his defense was that on April 11, 1980, his secretary delieved a handwritten note, composed by Judge Claiborne, together with a check in the amount of $8,000 and a W-2, and delivered these to the tax preparer, Joseph Wright; and in that note Judge Claiborne made a full disclosure of all of the income earned not as a result of fee-splitting, as it has been characterized, but all of the income earned as a result of his work product while he was in private practice, which was collected during that particular tax year.

It was at issue as to whether or not Judy Ahlstrom ever delivered anything on April 11, 1980. During the trial, the prosecutor framed that issue, the defense framed that issue, and it was contested that Judy Ahlstrom in fact did not make such a delivery on that particular day.

What took place as a result of this national inquest and people coming forward, new witnesses were developed who brought us information which, I submit, unequivocally proved that in fact the April 11, 1980, letter was delivered with the check and the W-2 to Jay Wright's office.

A woman actually was watching C-SPAN, and she said:

> I can't believe this testimony that I'm hearing. I know that this woman was in there on April 11, 1980. I worked there. I saw her there. I received the envelope from her, and I gave this envelope to the tax preparer.

Another employee of Jay Wright's office came forward, a Mr. Kenneth Swanson, and he testified:

> Not only was I told that Judge Claiborne's secretary was there on that day, but I also know that Jay Wright's office was the subject of several burglaries.

Now, Jay Wright, because of age, because of illness, because of the fact that his testimony was shaped by the IRS agent with whom he had almost a fraternal relationship, for whatever reason, did not have an independent recollection of anything to which he testified. He took the hypothetical and, based on his ordinary practice, testified as though it were fact. Jay Wright, all of a sudden, admitted he may—and it was only at this hearing before the committee, pursuant to rule XI—he may have received the letter that day. He really could not tell or not—a crucial piece of evidence which was withheld from us by the prosecution and by the trial judge at the time Judge Claiborne was tried, both the first time and the second time, in Reno.

The second year was 1980, and the tax return was prepared by a Jerry Watson, and nobody is arguing that this tax return was properly prepared. It was an abomination. It was written in pencil. It has arrows attached to it saying, "Type here." It was what the prosecutor, during the time of trial, characterized as a badge of fraud. It was crying out for an audit. But because Judge Claiborne is treated differently in every situation, other than other persons who are similarly situated, there was no audit, but, rather, he was indicted and stood trial.

And Watson, as the evidence was suggested before the committee of 11, was approached at an airport in Las Vegas by representatives of the executive branch, the same persons who were after Judge Claiborne who had the vendetta against Judge Claiborne, and these individuals knowing that Watson was warned that he was a target of a grand jury investigation that very day said to him, "Mr. Watson, you better get yourself a new lawyer." They chilled his rights under the first amendment and the sixth amendment. "You better get yourself a new lawyer because Judge Claiborne will turn on you if you continue to maintain your position of trying to help him and tell the truth that in fact Judge Claiborne did disclose to you for purposes of the preparation of the 1980 tax return the figure of $88,500 as moneys received from his private practice during that particular year the tax return was prepared."

And that, too, at the time of trial, was a contested issue.

There was a suggestion that documents were actually created after the fact by Judge Claiborne and myself in order to provide to him a defense, and when the truth came out and witnesses, once again as a result of not being afraid of the legal process, not being afraid of the abuse that they were getting from the executive and even—and I do not mean to sound paranoid; I submit I am telling the truth—even by the judge who tried the case, who was intimidated and who refused to turn over exculpatory material and who did not even examine exculpatory material, these witnesses felt within the perhaps breast of the 12 committee members who are receiving the evidence that they had nothing to fear, and they came forward and they told the truth and Charlotte Travaglia confirmed for the first time in any type of proceeding that she in fact knew that Judge Claiborne provided Mr. Watson with the figure of $88,500, and then she went on to recount her relationship with Mr. Watson as to how the return was prepared.

But in both instances the matters which were contested before the trial court in both instances have been clarified and rectified and now the subject of a motion for new trial which is pending in the district court.

What we ask of you is to consider at this juncture postponing your decision on the impeachment issue and provide us the opportunity to appear within a judicial environment, hopefully an environment where the Ninth Circuit will for the first time appoint one of their own to apply Ninth Circuit law where the vicinages of the alleged violation took place, to judge Judge Claiborne and to resolve the issue of the burglaries, of the withholding of favorable exculpatory evidence which was affirmatively withheld and suppressed by the executive and by the judiciary, provide us the opportunity to go into the burglaries of Mr. Wright's office, items which were never permitted to be expressed before, to explore the intimidation of the witnesses who did not come forward as a result of the attitude and treatment of the executive toward them and to have the judiciary resolve the issue.

That is one alternative which I suggest to you this day. That is a matter which you have within your discretion where you can say, "We don't want to make the decision now as far as Judge Claiborne is concerned, but rather let the courts make it."

I myself, looking around the room, knowing the type of treatment which we received before the committee, would feel very comfortable if you rejected that suggestion, and I will address that in a few moments. I myself would feel comfortable if we went forward with a full and fair trial before this esteemed body. But I wanted to at least suggest to you that you have an alternative at this time which you can adopt in order to postpone the matter for further consideration.

The VICE PRESIDENT. Thank you, Mr. Goodman.

We will now hear from Mr. Manager Hyde in opposition to the motion for postponement.

Mr. Hyde.

Mr. Manager HYDE. Mr. President, distinguished Senators, Chairman Rodino, Mr. Goodman, just a few remarks about the remarks of Mr. Goodman.

Judge Claiborne is not here because of any misconduct by the Government. He is here because he was tried and convicted beyond a reasonable doubt, given the presumption of innocence, by a jury of 12 people. His motion for a new trial was denied. His appeal to the Ninth Circuit was denied. His motion for rehearing en banc was denied. And his right of certiorari to the Supreme Court was denied.

That is why he is here.

And I suggest we are not here to determine the Government's alleged misconduct so colorfully described by Mr. Goodman. We are here to determine Judge Claiborne's misconduct, and if this vast conspiracy involving the Chief Justice of the Supreme Court down to IRS agents, FBI agents, and so many more, has any merit, then let an investigation be had by an appropriate committee of the Senate or of the House.

But here and now it is distraction, it is diversion, it is legal paranoia, the time-honored ploy of the defense—try anybody but the defendant; try the government.

Now, Judge Claiborne has filed a post-trial motion to postpone this hearing until the district court in Nevada or the Ninth Circuit of Appeals disposes of a new amended supplementary motion to vacate the sentence for an evidentiary hearing for discovery proceedings and for a new trial.

We submit this motion is dilatory, without merit, and ought to be denied.

Judge Claiborne cannot be heard to say that he has not had time to prepare his defense. He has been aware of the nature of these charges since at least December 1983. He has defended against these charges in two previous criminal trials, and in a full, fair, and wide-ranging hearing before the Senate Impeachment Trial Committee, a hearing that lasted 7 days of testimony.

A law school professor once said the first thing a lawyer has to learn to do is to be plausible in support of a groundless motion. I could not help thinking of that as I listened to Mr. Goodman exercise what I suggest is a positive gift for wanting things both ways.

Take note, if you will, that Judge Claiborne has had a full and fair trial on the tax issues before us. He even had witnesses testify that had never testified before in either criminal trial, 7 full days of testimony. Now he says to you with this motion, "Hold everything, stand in place, while I take portions of the record developed before the Senate committee, run back to Nevada and seek a new trial. That is for Judge Hoffman to decide or some of the 32 judges that have had to deal with this case so far to decide."

The issue here is not whether his felony convictions should be set aside and a new trial ordered, but whether on this record this court should remove him from office.

By this motion to postpone, Judge Claiborne proclaims a linkage with his criminal trial, his criminal convictions, but it was only a few short days ago Judge Claiborne's lawyer was insisting that these impeachment proceedings are and ought to be separate, distinct, and autonomous from any judicial proceeding.

Looking at the record here are some of the things that Mr. Goodman said: The record page 255, paragraph 14:

> That, most significantly, the impeachment proceedings before the Honorable United States Senate are a separate and distinct proceeding from any judicial proceeding and are sanctified by the solemnity of constitutional creation.

He asked for a trial de novo and he got it.

The record page 256, paragraph 19:

> . . . the Senate trial should also be treated as a distinct and autonomous proceeding . . .
>
> . . . the sanctity of the separation of powers doctrine would be irreparably eroded if the position of the Judicial and Executive Branch were substituted for the reasoned judgment of the United States Senate.

Record page 264:

> Significantly the Executive and the Courts did not bar his judicial trial because he had not already been impeached. Why then, extending that logic, should the legislative impeachment trial not be accorded the same solemn autonomy as the judicial trial? They are independent of each other. A trial on the merits is dictated in . . .

Record page 266:

> The issues must be tried before the Senate to confirm again the separation of powers doctrine:

Lastly, on record page 269:

> If the judicial function was an autonomous event, so, too, should his impeachment be.

So the issues have been fully and fairly tried and tried de novo. If you read through all the pleadings and arguments, you will see where, early on, Mr. Goodman argued the judge could not be criminally tried until he was impeached. But he could not be impeached for merely understating his income as that did not arise in and out of his function as a judge.

When I heard that one, I thought of Dr. Edward Teller, a Hungarian, describing another Hungarian as "someone who follows you into a revolving door and comes out ahead of you."

As to the issue of finality, this case has been tried, appealed to the ninth circuit, petitioned for rehearing en banc, denied, a writ of certiorari, denied and a full trial de novo committed. Enough is enough.

It is fundamental law that the pendency of posttrial motions in no way vitiates the finality of the status of Judge Claiborne's convictions. And in many criminal cases, as you know, years after conviction, a blizzard of posttrial motions continues to be filed. It is routine. There are jail house lawyers who make a career of doing that.

There is nothing more final than sitting in prison. And no court trial or appellate has stayed the execution of Judge Claiborne's sentence.

This Senate, sitting as a court, needs to determine whether it must remove Judge Claiborne from office, not from jail. You don't have that power and you don't have that responsibility. And I respectfully suggest you ought not to defer that judgment, which you are constitutionally mandated to make, by awaiting the outcome of the subsequent proceeding beyond this Chamber.

Senators, Judge Claiborne has a right to be treated fairly, but so does the American people. A complete record has been made before the Senate on every relevant issue of fact and law. And every day that Harry Claiborne sits in prison and collects his salary as a Federal judge is an insult to every law-abiding citizen of this country.

The prospect of his serving his sentence and then returning to a courtroom where all must rise and address him as "Your Honor" is an affront to the dignity of the Federal judiciary and an embarrassment to the rule of law and, yes, to ourselves, as well.

The record is here. The record is complete. It is time to get on with this unhappy task that circumstances thrust upon us and vote.

The **Vice President**. Thank you, Manager Hyde.

Mr. Goodman will now be heard on Judge Claiborne's motion to declare Senate Impeachment Rule XI unconstitutional, his motion for a full and fair impeachment trial before the entire Senate, and his application for subpoenas.

Mr. Goodman.

MOTION TO DECLARE SENATE IMPEACHMENT RULE XI UNCONSTITUTIONAL

Mr. **Goodman**. Mr. Chairman, thank you.

At the outset, my opening remarks, I would suggest, are not inconsistent with the position that we desire a full and fair trial before the U.S. Senate, an autonomous body, the only body, pursuant to our U.S. Constitution, that can conduct a trial for impeachment.

The judicial review which we seek in no way is antagonistic to that concept. They could be concurrent proceedings. And for the House to suggest that I was engaging in some type of sophistry I submit is unfair.

The hearing that we had before the rule XI committee was a very limited hearing. Chairman Mathias was clear in his mandate that, at the conclusion of the hearing, we had the right and, in fact, invited us if we thought it was appropriate to seek from this honorable body an expansion of the evidence which was taken before this committee, to seek from this body permission to have you summon and subpoena witnesses before you in order to make the determination as to whether or not you find those witnesses to be credible. And in no way were we limited to the record which was taken in a factfinding, filtering manner by the committee.

What is important and what has never been litigated in the courts, because we have been precluded from day one from so litigating, was the state of mind of Judge Claiborne.

I would like to give you a tidbit, if I might, as to the factual background as to what was existing in the Las Vegas, NV, community at the same time that Judge Claiborne purportedly engaged in these acts of willful misconduct. Before Judge Claiborne even went on the bench, there was a war going on between the Nevada judiciary and representatives of the Federal strike force; a war of such magnitude that a respected Federal judge, a senior judge in Reno, NV, characterized the strike force attorney as being schizophrenic; a war which brought in an FBI agent, Joseph Yablonsky, who vowed to get members of a particular religion, to get the judge, and to get other persons who were involved in politics in Nevada.

And this is what was existing at the time that Judge Claiborne, who knew he was a target of this type of vendetta, purportedly engaged in the acts which resulted in his conviction. And this was never permitted to be brought out before any court of law. The first time it was even hinted at was in the last several weeks before the rule XI committee.

As I indicated, on September 1, 1978, Judge Claiborne went on the bench. From the moment he got on the bench, not as a result of his relationship with these entities, but as a result of their perception of him, they felt, as Judge Claiborne so adequately described it last week, that he stood in the way of their ambitious task.

And on April 4, 1980, a Federal judge in Las Vegas issued a warrant, an unprecedented warrant, to the U.S. marshal there to seize from the Federal Justice Department Strike Force office caricatures of the Federal judiciary which portrayed them in a contumacious manner, which the judge indicated would bring fear into the hearts and minds of witnesses who were being prepared for presentation before grand juries or petit juries. And they characterized Judge Claiborne as the Ayatollah Claiborne and they characterized the other Federal judge as a clown. This is what the executive was doing.

And then, on April 9, 1980, just 5 days later, Judge Claiborne read—and it is an exhibit before you in volume 4—he read in the Las Vegas newspaper that he was the target of a grand jury investigation. That was on April 9, 1980. He was a target of a grand jury investigation where they said he engaged in illegal bugging of persons before he went on the bench.

On April 10, 1 day thereafter, Judge Claiborne, perhaps injudiciously, but perhaps as a man, lashed out and he said, "I'm not going to let this bunch of bums run roughshod over the citizens of this community." And he referred to them in terms much harsher than bums. And he took them on and he let them know what he thought. And that was on April 10, 1980.

And what happened on April 11, 1980? That is the day that he provided his tax preparer with the information which was going to be reflected on the 1979 tax return And, as Judge Claiborne has stated time and again, nobody has ever accused him of being dumb. And, when he knew what kind of pressure was being applied against him and what type of vendetta was launched against him, he was not about to defraud his Government. He wasn't about to engage in activity which in any way would suggest an improper motive on his part. That is the type of environment that existed which a jury was never permitted to hear.

Now, why is that important? Because, at the time that Judge Claiborne was engaging in the activities for which he stands indicted, the providing or lack of providing his tax preparers with certain information, it was this type of feeling that was present in the community directed against him.

He saw his friends being brought in before grand juries and indicted. He saw individuals in the community being picked upon, being threatened, and the threat was, "You won't be bothered by the executive anymore if you will provide information against Judge Claiborne." And he knew that he was the subject of their feeling because the FBI agent charged made it no secret—and the evidence is in the committee record—made no secret that he was going to get Judge Claiborne, that he did not like Judge Claiborne.

Judge Claiborne was subjected to break-ins. Judge Claiborne was subjected to a mail cover. Just about every person who came into Nevada to stand trial who had any contact with either Judge Claiborne or Judge Claiborne's associates over the years was approached by representatives of the FBI and the IRS and said, "Your charges will be dropped, will be dismissed. All you have to do is you have to tell us that Judge Claiborne did something wrong." One occasion, they went to one client of mine, an attorney that I was representing, and they said to him, "If you give Judge Claiborne $50,000 to fix your case, the case will be dismissed against you. If you don't want to give it to Judge Claiborne directly, give it to Goodman." That is what was happening in Nevada at the time, and Judge Claiborne is not dumb. He knew it. He would never engage in willful activity to cheat his Government.

The decision-making process was shaky as a result of this attitude that the executive had against Judge Claiborne. He has never been treated the same as any other citizen in this country in any proceeding which he has been involved in since day one. In the court proceedings, the rules were changed. People don't want to believe sometimes these allegations because they are so horrendous and so offensive to our sense of justice. But even at the appellate level by a special three-man panel which was appointed from judges outside of the ninth circuit, a judge, who was the author of the Claiborne opinion affirming the conviction, said that Joseph Conforte, the panderer who started this onslaught of evidence alleged against Judge Claiborne—that his reduction of sentence was legal because under rule XXXV of the Federal Rules of Federal Procedure, if a motion is made for reduction of sentence, the judge can grant it after 120 days.

That same judge, 3 days from that point in time that he wrote that opinion in a case called United States versus Gerhardt, wrote another opinion and he said the 120-day period is a fixed period, and the judge may not reduce the sentence outside of that period of time.

So the rules for one citizen are different from the rules as they apply to Harry Claiborne. It has been that way, and I hope that is will not continue that way because what we ask from you gentlemen today is a full and fair trial, the type of trial which was envisioned by the framers of the Constitution, by Thomas Jefferson, by Jay, by Hamilton.

Do you realize that the prior impeachment trials, the majority of which have ended in acquittals before the U.S. Senate over the years, the majority of impeachment trials last between 16 and 17 days? My good friends will say there are more important things in this country than to have an impeachment trial over some insignificant judge from the State of Nevada. No. There is not.

I respectfully submit to you that there is nothing more important to this country, to the United States of America, than to have its people see its Government in action, to have the Nation be witness to an inquest which evidences that there really is a separation of powers, which will witness the leaders of this country explore in depth whether or not one branch of Government can impede and violate the independence and the integrity of another branch of Government because of the installation of fear.

That is the lesson that this country has to learn. Maybe at that point in time it will learn to respect our laws, and we will not have the dope dealing which is a national crisis and the crime on its streets when we learn to respect that our leaders are interested in these concepts to get to the bottom as to whether or not at the time that Judge Claiborne engaged in the signing of his returns he did so willfully.

And I did state to the honorable Members of the House of Representatives that this is an autonomous proceeding. There is no question about that. The only body under our Constitution who can make the determination here is the U.S. Senate as to whether or not they are going to vote for impeachment.

With all due respect to Judge Claiborne, I resubmit that all he asks of you is not for an acquittal at this time. It is premature to ask for an acquittal because you have not heard the evidence. You have not witnessed the demeanor of the witnesses. You have not been able to grasp the nuance of the testimony. You have not been able to see an IRS agent who was being cross-examined 2 weeks ago, who was lying through his teeth, and in the afternoon of his examination he was wringing his hands and the sweat was coming down off his brow. Then they did to him what they did to their witnesses during the trial. They shaped him up overnight. When he came back the next morning, the sweat was stopped and the hands were on his lap and he was a much more relaxed witness. But you have to be able to see, you have to be able to see the witnesses in order to judge who is telling the truth. Was Judy Ahlstrom telling the truth that she delivered the April 11, 1980 letter? Was she telling the truth only by looking at Judy Ahlstrom, or taking perhaps the observation of one of the Senators who saw her, and saying she was credible because that was one of the few instances within the transcript where there was at least a semifinding of credibility, accepting that, or whether Charlotte Travaglia did in fact receive the $88,500 figure as a full disclosure by Judge Claiborne?

These are the types of things which are contemplated by a full and fair trial before the U.S. Senate, and not contemplated as a result of a filtering process engaged in by the committee of 11.

When we say that the committee of 11 is an unconstitutional committee, we do not do so disrespectfully but we do so with the fear that their limitation as to the scope of what was to be determined and what was to be suggested at that hearing will be limited upon this entire body of 100 Senators. That is where the fear comes in because it is only through having the 100 Senators make the determination as to the issues in the case can a fair trial as contemplated by our Founding Fathers be maintained.

The list of witnesses which we proposed encompass several areas of witness starting with the witnesses that engaged in the vendetta against Judge Claiborne. This would include the FBI agent in charge, Joseph Yablonsky, it would include Joseph Conforte, a panderer who received perhaps the most unconscionable disposition of a case in the history of this country.

Let me just give you this, if I may respectfully, for some flavor as to the price that the United States of America through its Justice Department was willing to pay for testimony against Judge Claiborne which was conceded at the time of the appeal as being perjured testimony, and which I submit to you if we were given the opportunity to have a full and fair trial before this body, and we were permitted to call the prosecutorial attorney, and Joseph Conforte, we would be able to show to you that the prosecutor knowingly used perjured testimony when he sought the indictment against Judge Claiborne, that the prosecutor knowingly used perjured testimony because he could not have indicted Judge Claiborne initially since the statute of limitations had run, and he knew that from Conforte's own mouth. Yet we were never able to bring that out in any court proceedings.

Joseph Conforte is a panderer who was a fugitive, who was under a 20-year sentence at the time he left the United States and settled in Rio de Janeiro.

The prosecutor on his honeymoon visited with Joseph Conforte and began negotiations with him to bring him back as a fugitive to the United States in order to testify against Judge Claiborne. And people complain about Harry Claiborne collecting his salary as he sits in a Federal institution. Well, how about if I told you that the Justice Department entered into a deal with Joe Conforte when they reduced his tax liability from 16 to 8? They assured him that he would not be prosecuted as a habitual criminal where he could receive a life sentence. They reduced his sentence illegally under any standard whatsoever by bringing him back to Washington, DC, and reducing his sentence after the reduction had been denied by another judge in Reno, NV, years before, and reduced his sentence to some 15 months, which would run concurrently with the State sentence that he was serving; that they permitted him to return to the United States as a fugitive without penalty.

As an American citizen, and all I do for my living is to defend persons who are accused of crimes, I have to believe every morning I wake up that the laws are going to be upheld and maintained, and the only thing that I can hang onto in my life representing the criminally accused, many of whom are innocent, is the Constitution. If I at any time believe that the Constitution is not being upheld, then I am going to have to do something else than practice law defending individual rights.

I have to look at this esteemed body to uphold the Constitution as it was contemplated some 200 years ago, and that is to ask you to fulfill your mandate, to satisfy your obligation, and provide to Harry Claiborne the fair and full trial to which he is entitled.

Mr. President, may I ask whether or not I have any time remaining?

The VICE PRESIDENT. The gentleman has 18 minutes remaining.

The Chair will inquire if it is your intention that the House managers respond to your statement at this point.

Mr. GOODMAN. Yes, sir.

The VICE PRESIDENT. Thank you, Mr. Goodman.

We will now hear from Manager Hughes in response to these motions and applications.

Manager HUGHES. Thank you, Mr. President.

My colleagues from the House of Representatives, the House managers, Judge Claiborne, counsel, and Members of this distinguished Senate: I rise in opposition to the motions to declare Senate Impeachment Rule XI unconstitutional, against the motion for a full and fair impeachment trial, and the collateral motion for application for the issuance of subpoenas. The latter, of course, is moot, if the previous motions are rendered moot.

First, I would like to direct myself to the argument of counsel that the Senate Impeachment Rule XI is unconstitutional. The rule provides for evidence to be received by a special committee designated by the U.S. Senate. It is procedure that is well within the sound discretion of the Senate in conducting an impeachment trial.

Article I, section 3 of the Constitution of the United States provides that the Senate "shall have the sole power to try all impeachments."

The Constitution does not dictate the manner in which the trial shall be conducted except no person shall be convicted without the concurrence of two-thirds of the Members present.

Consistent with its sole power to conduct an impeachment trial, the Senate has the inherent authority to fashion rules that govern the admissibility of evidence, the scope of the proceeding, and the manner, form, and location in which evidence will be received.

The Senate is essentially, as you well know, a legislative body. Although it sits as a jury and a judge on the merits of the articles of impeachment reported by the House of Representatives, it does require special procedures to receive the evidence and enable the some 100 Members of the Senate to evaluate that evidence.

The framers of the Constitution could have very easily vested the power and responsibility of impeachment in the Supreme Court or elsewhere. In their wisdom, that power and responsibility was created in the legislative branch of the Government. It was the intent of the framers that the proceeding be legislative and political as well as judicial in nature.

Of course, common sense must be used in fashioning a procedure that enables the Senate to judge a case of impeachment fairly and impartially and fully, relevant, of course, to the time in history that impeachment occurs.

It is not dissimilar, indeed, to the duties of the Senate with regard to its responsibility to advise and consent.

Counsel would argue that in fact it requires 100 Members of the Senate to advise and consent, not a Committee of the Judiciary or otherwise in the Senate. That is the defendant's basic argument.

The credibility of witnesses is alluded to. As you well know, that is judged on many, many factors, such as the documentary evidence in a particular case; an explanation of the inconsistent or incriminating conduct that might be involved in a particular case; the motive or lack of motives of the witnesses; and, of course, common sense is an extremely important aspect in determining the credibility of witnesses.

As you well know, a video tape is available for those Members of the Senate who want to view the specific testimony of witnesses. I, frankly, was very interested in hearing counsel describe the FBI agent wringing his hands, sweat coming off his brow. We must have been in a different forum. Of course, that is more of an aside and I respect the counsel for attempting to argue the case as he sees it.

But the fact of the matter is that the Senate is the sole judge of the type of trial to be accorded to a defendant who stands for an impeachable offense, and the delegation of this authority to a committee was a wise, prudent, and constitutional delegation of authority.

Relative to the defendant's motion for a full and fair impeachment trial, the defendant has had and is receiving a full and fair opportunity to present the evidence that he believes is important in establishing his innocence of the charges directed against him.

What is it that Judge Claiborne would have the Senate do at this time? He wants another trial, if you will, a fourth trial. Two jury trials, one being a hung jury, which took 4 months; a second trial when he was convicted by a jury of his peers on two counts of filing a false income tax return.

The Senate convened this special committee. That committee took some 7 days, fully receiving evidence to be submitted to the U.S. Senate.

In addition to these proceedings, Judge Claiborne has filed some 93 motions for relief in connection with his conviction for filing false income tax returns, including three motions and appeal to the ninth circuit court of appeals, two appeals to the U.S. Supreme Court for writs of certiorari. Presently pending is a motion for relief under section 2255, and several other motions are pending before the courts at the present time.

Indeed, the defendant indicates that he wants to be treated no differently than anyone else. The fact of the matter is the defendant has received special treatment. Very few defendants facing charges around this great country of ours have received the treatment that this defendant has received.

So it should be. Why is it the defendant at the present time is asking for a fair and full impeachment trial? First, it is clearly an effort to delay. Judge Claiborne realizes that time is on his side. With the press of legislative business and the need to adjourn this session of Congress, it obviously is in the interest of the defense to delay, in fact, postpone. It is also excellent defense strategy to cloud the defendant's own conduct with allegations of misconduct on the part of others; divert at any cost the attention from the defendant's conduct and place it on other people's conduct.

The defendant has argued about the alleged conduct or misconduct of everyone except himself. It reminds me of basic strategy 101 when I was in law school: when the facts are against you, you argue the law; when the law is against you, you argue the facts; when they are both against you, you just get up and argue. Basically, that is what we have seen throughout these entire proceedings. Indeed, the defendant would put the entire system on trial.

He suggests he has been targeted by the executive branch of the Government. That was the first motion, in fact, that was filed by the defendant to quash the indictments returned by a grand jury alleging governmental misconduct. So it has been throughout the entire proceedings, allegations of executive misconduct. The defendant would bring in the Director of the FBI. He has dropped Director Webster as one of the witnesses to be subpoenaed but that is a recent innovation. The defendant wanted to bring in Director Webster; Joseph Yablonsky, a former special-agent-in-charge; Steven Shaw, prosecutor, of the Public Integrity Sector of the Justice Department, a whole host of IRS agents, FBI agents. The defendant would have you believe that in addition, certain evidence was excluded such as the evidence of one Charlotte Travaglia in connection with an interview of June 7, 1983. We heard from Charlotte Travaglia; though she added very little, we did receive her testimony. She was available at the time of trial and could very easily have been called in the case below by the prosecution or the defense but was not called.

There were allegations that in some way, counsel was denied access to an interview of Joseph J. Wright on February 16, 1983, about so-called moves to destroy documents. We heard everything about that. Those dealt with documents that were destroyed, that were outdated, documents that were dated prior to 1976, that were destroyed in connection with a move of Mr. Wright's accounting office to a new location.

The defendant suggests that there was a coaching of witnesses and a harassment of other witnesses. Chairman Mathias permitted the defense carte blanche in examining the witnesses relative to the so-called coaching of witnesses and harassment of witnesses, and there was no demonstration that the Government in any way harassed witnesses. At most, what we saw was evidence that the Government throughout its proceedings did talk to the witnesses, attempt to refresh their recollection from the records that were available. Time dims recollection and it is only natural for the prosecution to talk to witnesses before a trial.

The defendant would argue that there were 100 hours of time consumed in coaching witnesses. Well, that included time once we received the evidence when the case was traveling through court, waiting for the grand jury to receive their testimony. So there was in essence no showing that there was harassment or a coaching of witnesses other than is normal in any trial.

We have heard a great deal about Joseph Conforte and the poisoning of the grand jury in this proceeding. Joseph Conforte has no role to play. He is not involved in any way in this proceeding. He wasn't a witness in the court below where the defendant was convicted. He has not in any way been a factor in this particular proceeding. But once again, the defense would take you out in that direction to talk about one Joseph Conforte, who really has no relevance in this proceeding.

Then finally, the argument that the prosecution engaged in an alleged black bag job on Judge Claiborne's home. No specification as to what was supposed to have been taken from the home. The allegations are disputed by the Government. It is suggested that in some way, the information concerning in fact the information, the tax information from 1979 and 1980 might have been taken at that time.

Finally, the defendant suggests that there is a conspiracy in selection of the judges for trial, conspiracy that originated with the Chief Justice of the United States right down to the members of the court of appeals. The defendant would bring in, as he requested during the hearing before the Senate committee, not just a Chief Justice but three judges of the ninth circuit court of appeals, and the Federal district court judge that produced the sentence on Joseph Conforte here, in the District of Columbia.

So in essence, the defendant alleges a form of misfeasance of judges in essence for not reading their briefs. Finally, the defendant attacks the process developed by the Senate to receive the evidence, it attacks the House managers for creating a mentality of a rush to judgment. In essence, what the defendant has done or endeavored to do is divert our attention away from the only relevant circumstance before this body; that is the question of the defendant's guilt or innocence on two counts of filing and subscribing false income tax returns for 1979 and 1980.

The defendant, Harry Claiborne, stands before you after having been convicted by a jury of his peers of making and subscribing false income tax returns for those 2 years. The conviction under title 26, section 7206(1) of the United States Code is based on essentially four factors: No. 1, that Harry Claiborne made or subscribed a tax return that was incorrect as to a material matter; No. 2, that the return contained a written declaration that was made under penalty of perjury; No. 3, that Harry Claiborne did not believe the return to be a true and correct portraying of his income in those years; and finally that Harry Claiborne subscribed willfully—that is, not by accident, mistake, or negligence. The only issue really in dispute in the court below and really before the Senate is a question of defendant's state of mind, whether Harry Claiborne made and subscribed those two returns in 1979 and 1980 intentionally and willfully.

The other factors are not in dispute and they weren't in dispute below when they were tried before a jury of his peers who found against the defendant.

The special committee created by the Senate under the chairmanship of Senator Mathias from Maryland took testimony, as I have indicated, for 7 full days. We worked some days 7 and 8 hours, much of the time without interruption. The Senate rules are indeed consistent with the rules of Federal evidence relative to the evidence that was to be received. Essentially, the chairman indicated that evidence would be received that is relevant. The rule that is adopted by the Senate parallels essentially the rules of Federal procedure. Rule 401 defines the concept of relevance as relevant evidence means evidence having any tendency to make the evidence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

So the question becomes whether it is probative, whether it has a probative value in establishing a fact. It was the ruling of the chairman, supported by the committee, that much of the proffer by the defense was not relevant. For instance, in connection with the allegations of judicial misconduct, biased and utter failings on the part of the judiciary, Chairman Mathias ruled—and the committee upheld that ruling—that that was not relevant. It is the Senate, not the judiciary, that will be the sole judge of the law and the facts in this particular case, not the judiciary. The deficiencies in the bribery prosecution, Chairman Mathias ruled—and that was supported by the committee—are not relevant to the tax cases. There is no connection between the alleged bribery offenses that were originally part of the prosecution's strategy in the first trial and the tax cases for which the defendant stands convicted by a jury of his peers.

Finally, Chairman Mathias, with the support of the committee, held that the alleged black bag job on Judge Claiborne's residence—and which is seriously disputed—basically would be received in the form of affidavits. There is no allegation, as I have indicated, that anything was removed from the judge's residence. At most the allegation is that the Government succeeded in receiving information about the legal fees in 1979 and 1980, and as I have indicated that really wasn't in dispute. The defendant conceded, admitted that those legal fees were received.

During the proceedings, Judge Claiborne alleged the Government harassing and coaching of witnesses. I have already indicated to you that we went way beyond what was originally intended in receiving evidence on that issue, and the defense came up empty on any suggestions that there was harassment in any way. The chairman permitted counsel wide discretion in examining Donald Skelton and other witnesses—in fact, asked to have him declared as a hostile witness so that he could cross examine Donald Skelton and other witnesses, and he did just that. There was no testimony whatsoever to support the thrust of the defendant's argument that there was in any way intimidation, harassment, or improper coaching of any of the witnesses that were adduced. He called and was able to produce testimony from each and every witness that the defendant wanted to produce on the tax charges.

Harry Claiborne has, indeed, received a fair and full trial before the Senate as intended by the framers of the Constitution. He is not entitled to turn this proceeding into an attack upon the system itself. It was never the intent of the framers of the Constitution to permit Harry Claiborne to be able to attack the judiciary, the executive branch of the Government, and finally the Congress of the United States in an effort to in fact shield his own conduct. The only conduct that is relevant in these proceedings is the defendant's conduct. The defendant would turn these proceedings into a three-ring circus, try everybody conceivable except the defendant himself.

His attempt to divert your attention from his conduct by attacking the judiciary, the executive branch of the Government, and now the Congress should be rejected by this distinguished body. Judge Claiborne has received his day in court and the proceeding that the Senate is now embarked upon is a fair proceeding, one that in fact does make common sense, given the fact that it is a legislative body and the defendant in fact is making the arguments that he has indicated he should make all along. This body has voluminous transcripts available, a video tape available of these proceedings, and certainly a full and complete record upon which to judge the defendant's guilt or innocense of the only charges before this body, whether or not the defendant did in fact file false income tax returns in the years 1979 and 1980.

The VICE PRESIDENT. Thank you, Manager Hughes.

Mr. Goodman will now be heard on Judge Claiborne's motion to designate beyond a reasonable doubt as the standard of proof in an impeachment trial.

MOTION TO DESIGNATE BEYOND A REASONABLE DOUBT AS THE STANDARD OF PROOF IN AN IMPEACHMENT TRIAL

Mr. GOODMAN. Mr. President, much of what has been said is accurate. The issue which is before this body is whether or not in the first time of the history of our country an impeached official is going to receive less than a full and fair trial as was contemplated by the framers of the Constitution. The authors of the Federalist Papers have made it abundantly clear that a trial before the U.S. Senate on the issue of impeachment is an autonomous proceeding. I find it difficult to understand the relevance as to what has taken place within the court situation when references are constantly made to the first mistrial, the second trial resulting in a conviction, and the third trial before the committee of 11. That wasn't a trial. It was never contemplated to be a trial. That was a filtering process and that is what we were advised at the beginning. This was not a factfinding expedition. It was an exploratory venture.

Initially, in 1935, when rule XI was first promulgated, the legislative history would suggest it was a method for the Senators to go out into the country to bring evidence back to the Senate so the Senate could make a determination as to what witnesses they wanted to be brought into the Senate Chamber for purposes of conducting a trial in front of the Senate. And the rule was never utilized before this instance. In Judge Halsted Ritter's case, it wasn't utilized. It was contemplated in the potential impeachment proceeding in 1974 but it wasn't utilized even at that point in time. And it wasn't a constitutional mandate. It was a rule made by the Senate that was to expedite proceedings, but it wasn't to replace the constitutional directive of a full trial before this esteemed body.

Now, if you were to have available to you the live witnesses or perhaps even as a secondary measure if you would commit yourselves to the proposition of looking at the video tapes of the witnesses who were examined during the committee hearing to ascertain what type of expansion you would desire to make for the purposes of concluding the full trial, we would have no objection. What we are concerned about is this rush to judgment that we feel, and I would like to advise this honorable body at this point in time—and there has been talk about this, but there has never been a resolution of it—so that we don't rush, so that we provide to Judge Claiborne the same right which is provided for the last 200 years and 300 years before that in England to persons in high office who are the subject of impeachment, don't be afraid that Judge Claiborne will draw his salary if given a full and fair hearing. If permitted that, he would tender his salary into an escrow. He would place it with the Secretary of the Senate or whatever officer would take possession of it and pending a resolution of a vote after a full and fair exposition, if he were successful and acquitted, he would expect his due. If it was a ruling against him, it would be forfeited.

In addition, do not be fearful that should Judge Claiborne be released from the prison as a result of parole that he will return to the bench. Judge Claiborne took the position initially when the indictment was returned on December 8, 1983, and he wrote to Chief Judge Browning of the ninth circuit and said, "I will follow whatever directive the Chief Judge has for me as far as sitting on cases" and did not actively sit on cases since that time.

So those are not real fears as long as he is provided with what he is entitled to under the Constitution. And as far as the expanse of the record, I can't represent to this esteemed body what took place in executive session after certain of the motions were argued before the rule XI committee. We heard through the grapevine, for lack of better expression, that there were certain members of the committee who desired an expansion of the record but they couldn't carry the day as far as the vote was concerned. But those Senators know their innermost feelings and as to how they would have applied their judgment for seeing the witnesses live and before them and being able to judge their demeanor and credibility.

I do not know what the House managers are afraid of. Isn't this supposed to be a search for truth? Isn't that what this country is all about? That is all we are asking for, that the truth finally comes out, and we have been precluded from that opportunity since the day the indictment was returned.

When you make your judgment and you evaluate the evidence in the case, I would respectfully suggest to you that the standard that you utilize is the standard of proof beyond a reasonable doubt. This has been debated through the years. Back in 1974, in anticipation of another impeachment proceeding, the Honorable Robert Taft, Jr., indicated that, in discussing the proceedings going back to

President Johnson's impeachment, that the accused can only be convicted when the evidence makes the case clear beyond a reasonable doubt. And he states that nothing thereafter has changed that position, and the Senate had acquiesced and agreed to that very day that that was the required means of persuasion.

The Honorable Sam Ervin, in 1974, said: "In cases of this kind, if we are called upon to try an impeachment"——

To try an impeachment——

"—I would not vote for conviction on any charge unless I was satisfied beyond a reasonable doubt of the truth of the charges."

The Honorable Senator Strom Thurmond, who sits here today, recognized what an impeachment is all about when he said: "The penalty of impeachment is severe. It is not a criminal penalty, but I know of no penalty that would be more severe then to remove, once again, a President from office, and therefore I believe that the evidence should be beyond a reasonable doubt."

I see the Honorable Senator John Stennis, who stated: "Where any party is charged with an impeachable offense and is tried by the Senate, it is highly important to them——"

And I add, as an aside, nothing could be more important to Harry Claiborne as he sits here today——

"—be it a so-called minor offense on up to the highest official under our Constitution, then I think the proof required ought to be beyond a reasonable doubt. The Nation is a party, and that requires substantial evidence beyond a resonable doubt."

I submit to you that the Nation is a party to these proceedings, and the Nation is watching these proceedings; and, in all humility, I would respectfully suggest and request that history not be broken, that history continue, and that Harry Claiborne get a full and fair trial, to which he is entitled.

The Vice President. Thank you, Mr. Goodman.

Manager Kastenmeier will now be heard in response to the motion.

Mr. Manager Kastenmeier. Mr. President, I will speak briefly in opposition to the motion to designate "beyond a reasonable doubt" as a standard of proof, and narrowly to that question.

Since we believe the fundamental purpose of an impeachment proceeding is to preserve the confidence of the people in public officials and institutions, we believe it proper that the House of Representatives establishes by a preponderance of the evidence that Judge Claiborne has committed an impeachable offense.

Now, it is true that the Supreme Court has held as a standard of law in this country that in a criminal proceeding, the charges must be proved beyond a reasonable doubt. This is to safeguard those who would lose their liberty or lose their lives in a criminal proceeding. This standard, I submit, is inapplicable in an impeachment trial, which cannot result in the imposition of criminal punishment.

As a matter of fact, article I, section 3 of the Constitution expressly provides that the judgment of the Senate "shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

Parenthetically, of course, the respondent has, in fact, been tried in a separate proceeding and been found guilty, wherein, as a matter of fact, the standard beyond a reasonable doubt has been found. But not here. The job of this body is to judge whether or not removal from office is appropriate.

It is a case, I suppose, in terms of loss of job, that millions of Americans have lost jobs, sometimes for cause and sometimes not. At least, thousands have lost jobs in positions of trust for Government, sometimes for cause and sometimes not. But this is a rare case, where the respondent has enormous constitutional prerogatives for his defense.

We know specifically how difficult it is to remove by the impeachment process a public official. He is safeguarded. It must be a separate proceeding of the House that affirms articles and a separate proceeding of this body that affirms articles, and by a two-thirds vote in this body.

In a balancing of interests, in assessing the public interest, in the removal of a corrupt official, do not impose such a high standard as probable cause—or, reasonable doubt, rather. Historically, these proceedings are not criminal proceedings.

As recently as 50 years ago, in the last proceeding, the impeachment of Halsted Ritter, the Presiding Officer said:

> An impeachment proceeding before the Senate, sitting as a court, is sui generis, partaking neither of the harshness nor rigidity of criminal law, nor of the civil proceeding requiring less particularity.

This is not a criminal proceeding. We should not be deluded by terms such as high crimes and misdemeanors, as conviction, that appear in the Constitution, borrowing from the past, from a British tradition that imposed criminal sanctions.

We here submit that there is no reason for the Senate to adopt the burden of proof that would fail to provide sufficient protection to the public interest for the removal of corrupt officials.

We submit, too, that never has the U.S. Senate, in impeachment proceedings past, ever adopted such a standard.

It may be true, as the respondent's attorney has suggested, that individual Members, especially years ago, considering the severity of the case of an impeachment of a President, may have submitted that they, themselves, might contemplate a higher standard. But I say to you, even if that were the case then, on an individual basis, do not shackle this body by imposing such a high standard. Impeachment trials in this body historically have never done so and precedentially do not bind you.

Please do not bind yourselves now or potentially unfortunately in the near future possibly when again such an unfortunate proceeding may be necessary for judgment in the future. Apply your own good judgment and reason.

A preponderance of the evidence is all that is necessary for removal from office. You are not sending the respondent to prison. You are not taking his life.

It is well to think of the interests of the people of the United States in this process. I submit that standard submitted by the respondent ought to be rejected by this body and that the Senate, as it has historically, apply its own personal judgment and even conviction to this matter and not an artifical criminal standard.

The VICE PRESIDENT. Thank you, Mr. Manager Kastenmeier.

CLOSED SESSION

The VICE PRESIDENT. In accordance with the unanimous-consent agreement that was entered into yesterday, the Senate shall proceed now in closed session until no later than 1 p.m., with deliberation of the motion, and the Sergeant at Arms will make the necessary arrangements.

(At 11:45 a.m., the doors of the Chamber were closed. The proceedings of the Senate were held in closed session until 1:10 p.m., at which time the Senate recessed until 2 p.m. whereupon the following occurred:)

OPEN SESSION

The VICE PRESIDENT. The majority leader is recognized.

Mr. DOLE. Mr. President, I know there is a unanimous-consent agreement that we should vote at 2 o'clock, but until the distinguished minority leader is present, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. Dole addressed the Chair.

The VICE PRESIDENT. The Senate will be in order and the majority leader is recognized.

Mr. DOLE. I ask that further proceedings of the quorum call be rescinded.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. DOLE. I ask that we may have order in the Senate.

The VICE PRESIDENT. The Senate will be in order. Senators are asked to take their seats and the gallery will be in order. The clerk will report a motion.

The assistant legislative clerk read as follows:

> Motion by Messrs. HEFLIN and WARNER: move to postpone the decisions on all the motions except for the first motion to postpone until the conclusion of the presentation by the managers and the defendant.

The VICE PRESIDENT. The question is on the motion.

Mr. BYRD. Parliamentary inquiry, Mr. President.

The VICE PRESIDENT. The Senator will state it.

Mr. BYRD. What would be the interpretation of the Chair as to the time when the decision would be made on the motions other than the first one?

The VICE PRESIDENT. Beginning at 6 p.m. this evening.

Mr. BYRD. I thank the Chair.

The VICE PRESIDENT. All those in favor say aye. Opposed.

The ayes appear to have it. The ayes have it. The motion is carried.

The question now is on the first motion. Judge Claiborne has moved the Senate to postpone its consideration of the Articles of Impeachment pending the disposition by the district court for the District of Nevada and the Ninth Circuit Court of Appeals of a supplemental motion under title 28, section 2255, of the United States Code. All those in favor of postponing this impeachment trial please signify by saying aye. All those opposed.

The nays have it and the motion is rejected.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the motion was rejected.

Mr. MATHIAS. I move to lay that motion on the table.

The VICE PRESIDENT. Without objection, the motion is laid on the table.

In accordance with the unanimous-consent agreement of yesterday, the time until 6 p.m. is allotted for final argument. This time will be equally divided between the parties. Under Senate impeachment rule XXII, final arguments shall be open and closed by the House of Representatives.

The Chair understands that final arguments for the House will be presented by Manager Rodino and Manager Fish.

Mr. Fish, it is the Chair's understanding that you will speak first. Manager Fish.

Mr. FISH. Mr. President, Members of the U.S. Senate, my colleagues, the House managers, Judge Claiborne, Mr. Goodman: This is a solemn and tragic moment. It has been 50 years since a Member of the House of Representatives stood in the well of this Chamber to ask for the conviction of a public official who has been impeached.

The role of the House of Representatives in bringing this case against Judge Claiborne is not one that we relish. An impeachment leaves a scar not only on the public official involved but on our entire Government.

So why are we here today? We are here because Judge Claiborne has been convicted by a jury of his peers of two felony offenses. We are here because Judge Claiborne sits in prison for his crimes. Most importantly, distinguished Members of the Senate, we are here because the evidence gathered here independently proves that Judge Harry E. Claiborne willfully and intentionally understated his taxable income by over $190,000 in just 2 years.

Now, how did he do this? He failed to disclose detailed information to his accountant. He participated in the creation of an imaginary sale at a loss of the successful legal practice he built before going on the bench. He reported no gain from the sale of a home that he knew would cause substantial tax liability. He cashed legal fee checks at casinos.

These actions of Judge Claiborne—not the FBI, not the IRS, not his accounts, nor the judicial, nor the executive branch of Government—these actions of Judge Claiborne compelled his conviction by 12 citizens of the State of Nevada, and these same actions compel his conviction in the Senate and his removal from office.

The evidence that myself and my colleague, Mr. Rodino, will summarize tells a fascinating tale of deception, of dishonesty and, yes, greed.

These were not the actions of a gullible, unsophisticated, overworked man but of a college educated law school graduate, successful trial lawyer, and Federal judge. Before considering that evidence in detail, let me review the charges that have been brought against Judge Claiborne. On June 26, 1986, the House of Representatives voted to impeach Judge Claiborne on four Articles of Impeachment. The vote in the House of Representatives was unanimous. Each of the Articles of Impeachment are separate and distinct and provide a compelling basis for Judge Claiborne's conviction in the Senate.

Article I alleges that Judge Claiborne willfully made and subscribed a false statement on his 1979 income tax return. Specifically, article I alleges that Judge Claiborne falsely reported his income in 1979, understating that income by over $18,000. In other words, article I alleges the underlying conduct that formed the basis for Judge Claiborne's conviction.

Article II alleges that Judge Claiborne made and subscribed in false statement on his 1980 tax return. In 1980, Judge Claiborne understated his taxable income by over $173,000. Again, article II alleges the underlying conduct that formed the basis for Judge Claiborne's conviction.

Article III alleges the fact of these convictions of Judge Claiborne as an independent basis for his removal from office. Article III asserts that an individual who has been convicted of two felony offenses, in a proceeding that was fundamentally fair and that now is final, should—for that reason alone—be removed from the position of trust that he holds on behalf of the United States.

Finally, article IV alleges that Judge Claiborne, through his conduct and by his convictions, has damaged the integrity and the impartiality of the Federal judiciary that he represents. Judge Claiborne's conduct and his convictions do more than undermine his personal reputation. He has brought disrepute upon the Federal judiciary. To restore the integrity of the judicial branch of our Government, and to maintain public confidence in the administration of justice, article IV pleads that Judge Claiborne should be removed from office.

Each of these articles of impeachment, either directly or indirectly, involve charges that Judge Claiborne willfully made a false statement on his 1979 and 1980 income tax returns, in violation of section 7206 sub. (1) of title 26, United States Code. This statute is one of the provisions enacted by the Congress to ensure the full and honest disclosure of tax information by all citizens. Voluntary and complete disclosure is the cornerstone of the self-assessment of our tax liability.

The elements of this offense are simple. Section 7206 sub. (1) is violated when an individual "willfully makes and subscribes any tax return, under penalties of perjury, that he does not believe to be true and correct as to every material matter." Simply stated, the offense requires first, a material falsehood; second, a declaration that the statement is made under penalties of perjury; and third, willful and knowing conduct on the part of the taxpayer.

Judge Claiborne did not deny in this case that he received over $190,000 in 1979 and 1980 that he did not report on his tax returns. Although he attempted to conceal his receipt of income, cashing checks at casinos and giving false information to his accountant, Judge Claiborne's receipt of income was established unequivocally by other documentary evidence. Thus, Judge Claiborne's defense has centered on the element of "willfulness"; he claims he is the "innocent beneficiary" of gross errors committed by two different accountants. In considering this claim, it is useful to understand precisely what the term "willfulness" means.

The Supreme Court of the United States recently held that "willfulness" in the tax statutes does not require a finding of a bad purpose or evil motive. Judge Claiborne's brief simply misstates the law. Willfulness simply means, and I quote the high court: "a voluntary, intentional violation of a known legal duty."

Courts also have recognized, not surprisingly, that the element of "willfulness," which is a subjective state of mind, rarely is proved through direct evidence. A crime whose very purpose is to conceal is not often broadcast with direct proof. However, willfulness may be inferred from circumstantial evidence. Once again, our Supreme Court has held that willfulness may be inferred from "any conduct, the likely effect of which would be to mislead or to conceal."

Willfulness has been inferred in other decided cases, involving other taxpayers, from precisely the kind of evidence that is present in this case. Willfulness has been inferred from a consistent pattern of underreporting. Indeed, courts have held that "a 2-year pattern of derelictions is itself indicative of the willfulness of the taxpayer's actions." Willfulness also has been inferred from the magnitude of the error; the larger the misstatement, the less likely a taxpayer would not realize what he was doing. Willfulness also has been inferred from the disclosure of only summary information to a tax preparer, rather than detailed, underlying data; from a sudden and suspicious change in accountants; and from the presence of "surreptitious cash transactions." Courts repeatedly have recognized that willfulness is likely where the taxpayer is highly educated, has substantial business or professional experience, or has demonstrated a familiarity in the past with basic tax concepts. Finally, courts have held that it is proper to infer willfulness "from proof that a taxpayer deliberately closed his eyes to what would otherwise have been obvious to him."

Mr. Rodino and I soon shall demonstrate that every one of these factors is present in this case, although willfulness may be inferred from just one. This is a textbook case. While an inference of willfulness can be inferred from any of the eight fact situations that I have enumerated, in this case we have all eight.

I ask you bluntly: Can it be mere coincidence that Judge Claiborne underreported his income in 1979, again in 1980, and indeed in 1981 and 1982 as well? That the amounts involved total almost $250,000? That for the first time in his life he began cashing fee checks at casinos? That to carry out this scheme, he dropped his accountant of 30 years to hire a man with no professional training? That throughout this period, Judge Claiborne was writing opinions in tax cases? Consider these factors, ladies and gentlemen, as you hear the evidence summarized by both the House of Representatives and the defense.

Before he became a Federal judge, Judge Claiborne had a lucrative private practice. He specialized in criminal law and earned an outstanding reputation as a trial lawyer. Stop for a moment and consider the significance of that fact. To be successful, a trial lawyer must be perceptive. He must probe for the truth. He must pay close attention to detail. Using these skills, Judge Claiborne developed a private practice that grossed over $375,000 in 1977, with a net income of almost $200,000.

In 1978, Judge Claiborne assumed the Federal bench. His salary dropped to $54,000. However, he continued to receive legal fees for work he had done before he became a judge. Judge Claiborne received a significant amount of legal fee income in 1979, 1980, 1981, and 1982. It was this fee income that Judge Claiborne understated on his 1979 tax return, and that he failed to report in its entirety on his 1980, 1981, and 1982 returns.

It is not disputed that, in 1979, Judge Claiborne received over $41,000 in legal fees. He reported only $22,000 of that sum on his form 1040, schedule C—an underreporting of over $18,000.

Judge Claiborne's 1979 tax return was prepared by his friend and accountant for 30 years, Mr. Joseph Wright. Both Mr. Wright and Judge Claiborne testified that, prior to 1979, Judge Claiborne had his bank statements and bank deposit records sent directly to Mr. Wright by the bank. Judge Claiborne had for years instructed Wright to treat all deposits reflected on the bank statements as legal fee income, unless he was otherwise advised. Judge Claiborne admitted that, prior to 1979, he always deposited all of his fee income in his bank account.

Two significant things changed in 1979. First, for the first time in his life, Judge Claiborne began to cash fee checks at local casinos. In doing so, of course, he left no meaningful record of the receipt of this income. What kind of explanation does Judge Claiborne give for this behavior? First, he suggests that he cashed fee checks so as to have "pocket money." Yet, many of these checks were for amounts of several thousand dollars. Indeed, in 1980, one check that he cashed at the casino amounted to $37,500. Some pocket money. What kind of pocket money did Judge Claiborne need?

Second, perhaps realizing the absurdity of this claim, Judge Claiborne testified for the first time in this proceeding that, after he cashed checks at casinos, he deposited some of the money in the bank. Why would a man cash a check at a casino, and then deposit cash, rather than the fee check itself, in the bank? I suggest there is no legitimate explanation for Judge Claiborne's cashing of fee checks. The only explanation is to obscure the receipt of fee income.

A further significant event occurred in 1979. Judge Claiborne told his bank not to send Mr. Wright the bank statements. In addition, Judge Claiborne did not personally give those bank statements to Mr. Wright. In that year, as a result of these actions of Judge Claiborne, Joseph Wright became completely dependent on Judge Claiborne for information concerning the judge's fee income.

In March 1980, Judge Claiborne provided that information to him. He sent Wright a memorandum, House exhibit 17, that purported to be a recap of the Judge's fee income for 1979. The memorandum is important for three reasons. First, it claimed to be authentic. Second, in his own handwriting, Judge Claiborne told Wright that his fee income was approximately $46,000. The judge testified that he knew from memory that this figure was correct. Third, Judge Claiborne stated in the memo, and testified before the Senate, that he compiled the information "from his bank statements." Consider this, Members of the Senate, we know, and Judge Claiborne knew, that he had cashed over half of his fee checks for the year 1979. What can be the significance of his testimony under oath that he prepared an "authentic" list of his fee income from his bank statements? The March 1980 memorandum and Judge Claiborne's sworn testimony are false. Judge Claiborne knew that he had cashed over half of the fee checks, but he obviously did not want Mr. Wright to know this fact. I ask you to ask yourself, why?

Joseph Wright repeatedly relied upon the information that Judge Claiborne gave him in the March 1980 memorandum. March 7, Wright sent a letter to a mortgage company, identifying Judge Claiborne's fee income as approximately $46,000. April 8 Wright prepared an estimate of the Judge's tax liability for 1979, again using the $46,000 figure for fee income. May 22, Wright again, at the Judge's request, sent letters to mortgage companies, identifying Judge Claiborne's 1979 fee income as $46,000. Throughout March, April, and May 1980, Joseph Wright relied upon the information that Judge Claiborne had given him in the March 1980 memorandum.

The most significant event with respect to the 1979 return occurred, however, after May 22, 1980. It is an event for which Judge Claiborne has absolutely no explanation. After May 22, Judge Claiborne called Mr. Wright and told him that certain items in the March 1980 memorandum were not legal fees. Specifically, Judge Claiborne told Wright that a February 2, 1979, deposit actually consisted in part of the proceeds of a time certificate of deposit. An April 18, 1979, deposit resulted from the sale of an airplane. Deposits on May 30, 1979, and on November 20, 1979, represented interest income. Judge Claiborne told Mr. Wright that the remaining four deposits—and only those deposits—represented his fee income for 1979. These four items totaled the exact amount that Joseph Wright later reported on Judge Claiborne's 1979 income tax return. Judge Claiborne told Wright that his fee income was only $22,000—about half of the true amount.

Joseph Wright made a detailed record of this conversation. Next to each "deposit" on the March 1980 memorandum, Mr. Wright recorded the information that Judge Claiborne gave him. As Judge Claiborne admitted, Wright had no other source of information for the notations he recorded. Judge Claiborne had told the bank to stop sending information to Wright. Only Judge Claiborne could have supplied the false information that Wright recorded.

Subsequent to this conversation, Judge Claiborne sent Mr. Wright another handwritten memorandum, House exhibit 21. In this memorandum, which was written for the explicit purpose of giving Wright detailed information for the preparation of the 1979 tax return, Judge Claiborne wrote that his fee income was $22,000. Let me repeat, Members of the Senate: This false statement is in Judge Claiborne's own handwriting. It was not prepared by anyone else. Let's place the blame in this case where it lies: with Harry E. Claiborne. Moreover, in a Judicial Ethics statement prepared during this same period, House exhibit 16, Judge Claiborne again identified his income from legal fees as $23,000. These documents prepared by Judge Claiborne conclusively prove that he is no "innocent beneficiary" in the underreporting of his income.

What does Judge Claiborne say about these documents? In his post-trial brief, he says absolutely nothing. On behalf of the House of Representatives, I invite each of you to search that brief for any explanation of these documents, written by Judge Claiborne, that falsely depict his 1979 fee income. You will find not one reference to the March 1980 memorandum. You will find not one reference to the tax worksheets prepared by Judge Claiborne, nor will you find one reference to the judicial ethics filing. Judge Claiborne chooses to talk about burglaries and wild theories of a government conspiracy. Why? Because these documents prove that Judge Claiborne, and not his accountant, was responsible for the understatement of income of his tax return.

At the evidentiary hearing, Judge Claiborne did attempt to respond to this damaging proof. Let me demonstrate how his efforts were completely unsuccessful and, indeed, fraudulent. Consider please this testimony offered by Judge Claiborne.

In an attempt to explain the notations that Wright made on the March 1980 memorandum, Judge Claiborne testified that he did tell Wright some time later that the February 2 deposit actually resulted from the cashing of a time certificate of deposit. Judge Claiborne was very specific in this testimony. He said that Wright called him and asked whether the February 2 deposit was a legal fee. The Judge allegedly responded that he would check. Judge Claiborne explained under oath that he went to his records, determined that the February 2 deposit was a time certificate of deposit, and called Wright to tell him so. Can this testimony be true? The answer is no. In response to Judge Claiborne's attempted explanation—which, by the way, he had not made in either of his criminal trials—the House of Representatives introduced a series of bank records, House exhibit 42. Those bank records show that Judge Claiborne did make a deposit of approximately $21,000 on February 2. The records also show the source of that deposit. It consisted of three checks: A $17,000 fee check, an $84 fee check, and a $3,000 salary check. The February 2 deposit had nothing to do with a time certificate of deposit.

How can Judge Claiborne stand before the Senate with a straight face and state under oath that he told Joseph Wright that the February 2 deposit actually was a time certificate of deposit? Not only has Judge Claiborne changed his testimony from his earlier trials, that testimony is demonstrably false. This man does not deserve to be a Federal judge.

Judge Claiborne also attempts to absolve himself from responsibility for the misstatement of income on the return by declaring that he signed the return in blank. When pressed by the House of Representatives, Judge Claiborne testified under oath that he signed the blank return on the evening of May 2, 1980, in Mr. Wright's office. The House then proved that Joseph Wright had left on vacation the afternoon of May 2. Confronted with this fact, Judge Claiborne changed his testimony and stated that he signed the return over the lunch hour. This inconsistent, self-serving testimony simply is not credible. There is direct evidence that Judge Claiborne did not sign his 1979 return in blank. There is a notation in Mr. Wright's appointment book that, on Monday, June 16, 1980—the date the completed tax return was filed—Judge Claiborne went to Mr. Wright's office. When confronted with this evidence, Judge Claiborne testified that the appointment book had been falsified by Joseph Wright, his close friend for 30 years.

To accept Judge Claiborne's explanation, you must believe that Joseph Wright computed the wrong figure for fee income from thin air. Judge Claiborne offers no explanation. You must believe that Joseph Wright would falsify documents to convict a man who was a special client and an honored friend.

Judge Claiborne earlier has testified that Joseph Wright is "highly qualified and exceedingly honest." It is a tragedy and a travesty to hear Judge Claiborne now accuse that same man of falsifying documents.

Finally, to accept Judge Claiborne's explanation, you must believe that he simply "forgot" half of his fee income when he prepared his tax worksheets. You must believe that he simply "forgot" half of his fee income when he prepared his judicial ethics statement. Yet when he needed to secure a mortgage for a new home, he "remembered" the full amount of the same fee income.

Judge Claiborne asks you to believe too much. A jury rejected his explanation. So too should the U.S. Senate.

Judge Claiborne does not focus on these propositions, even though they are critical to his case. Instead, he speaks only of a letter that he supposedly sent Wright on April 11, 1980, which allegedly identified the correct amount of his legal fee income. There are several things that are significant about this mysterious letter. The information in the letter was not solicited by Mr. Wright or even needed at that time. The letter makes no reference to the earlier March 1980 memorandum. Several weeks after the letter supposedly was sent, Joseph Wright wrote letters to two mortgage companies, still using the information in the March 1980 memorandum. Several weeks after the letter supposedly was sent, Judge Claiborne prepared tax worksheets and a Judicial Ethics statement that reflected legal fee income of only $22,000. Both Joseph Wright and his wife, Constance Wright, testified that they had never seen the April 11 letter until it was shown to them by Oscar Goodman in 1983. Unlike all of the other documents in this case, that single piece of paper was not found in Mr. Wright's files. Judy Ahlstrom, who claimed that she delivered the letter, was impeached repeatedly with prior inconsistent sworn testimony. In sum, there are many reasons to believe that Judge Claiborne never wrote or sent the April 11 letter.

In any event, proof of willfulness in 1979 does not depend upon the delivery or nondelivery of the April 11 letter. The evidence that Judge Claiborne reviewed the information in the March 1980 memorandum, that he directly told Joseph Wright that his fee income was $22,000, that he recorded that amount on his tax worksheets, that he used that amount in filing his judicial ethics statement, and that he signed a tax return that reported $22,000 in legal fee income, all conclusively demonstrate that Judge Claiborne personally is responsible for the understatement of income and the evasion of taxes on his 1979 return.

There is direct evidence of falsehood in 1979, substantial proof of "surreptitious cash transactions," and the disclosure of only summary information to Mr. Wright. Each of these facts provides a legitimate and compelling evidence of willfulness. Coupled with the overwhelming evidence of Judge Claiborne's massive understatement of income in 1980 and subsequent years, the record demonstrates that Judge Claiborne's actions were willful. Gentlemen, we, the managers on the part of the House, would not be here otherwise.

The same evidence that has been presented to the Senate was heard by a jury in Judge Claiborne's criminal trial. That jury weighed this evidence, evaluated the credibility of these same witnesses, and found beyond any reasonable doubt that Judge Claiborne willfully had underreported his income in 1979. Based on this same evidence, and the fradulent explanations that have been offered by Judge Claiborne, the Senate must reach the same conclusion.

I now turn to my colleague, the Honorable Peter Rodino, to summarize the evidence presented in support of article II and the 1980 return, as well as articles III and IV.

The VICE PRESIDENT. Mr. Manager Rodino.

Mr. Manager RODINO. Thank you very much, Mr. Fish.

Mr. President, distinguished Members of the U.S. Senate:

Let me begin with consideration of the events of a new tax year, the year of 1980. That I do so at all is significant. The 1980 return involves different tax concepts, and a different tax preparer. The cast of characters is different, but two facts remain constant: First, Judge Claiborne's income is grossly understated, this time by over $170,000; and two, Judge Claiborne blames his accountant for the error. Once again, Judge Claiborne asks you to believe that he is simply an innocent beneficiary of errors that avoided the payment of over $96,000 in taxes.

If Judge Claiborne's explanation of these events is acceptable, no citizen need voluntarily pay any tax. The criminal sanctions in the Tax Code can never be utilized. According to Judge Claiborne, an individual can hire the most incompetent tax preparer, participate in the most irresponsible treatment of basic tax concepts, create sales of assets that do not exist, fail even to bother to read the return, enjoy a refund of thousands of dollars, and simply wait for an audit. What I have just described, however, is not the tax system in our country. What I have just described is a fraud, which was perpetrated on our Government and then paraded before the U.S. Senate.

We have witnessed events that smack of impropriety and deceit. The man who conspired with Judge Claiborne in the preparation of this shocking return, Mr. Jerry Watson, was represented at the hearing by one of the Judge's character witnesses. First, Mr. Watson blamed a women named Charlotte Travaglia. After Mrs. Travaglia cleared her name, Mr. Watson—upon the advice of biased counsel—invoked the fifth amendent. After a weekend recess, Mr. Watson returned to blame the return now on a secretary, who is dead.

In the midst of these events, new documents mysteriously appeared and just as suddenly were dropped. After 6 years, Judge Claiborne identified for the first time a document that he supposedly received that explains the 1980 tax return. Defense Counsel Oscar Goodman then pulled this document from his briefcase, and claimed that it had simply been gathering dust through two criminal trials. Perhaps realizing the absurdity of this contention, after a recess, Judge Claiborne testified that the document in Mr. Goodman's briefcase was identical to the one that he had received, except for the last section. No explanation ever was offered for that last section, and the document was quietly shelved. Then Mr. Watson began to produce documents from his file, even though he had never produced these documents before, he had failed to disclose them when his files were subpoenaed by a grand jury, and he previously had testified that he had returned all documents to Judge Claiborne. These are just some of the remarkable events that occurred in this proceeding.

I submit to you that this is the climate in which Judge Claiborne's testimony with respect to 1980 must be considered. There is no question that he misstated his income by over $170,000 and evaded payment of over $96,000 in taxes. Could he be blind to these facts? The evidence proves that he was not.

In 1980, two significant tax events occurred for Judge Claiborne, each having substantial tax consequences. First, he received a large amount of fee income from his law practice. He received four checks that totaled almost $88,000—an amount far greater than his judicial salary of $54,000. Second, Judge Claiborne sold his home for a considerable gain, and reinvested only a portion of that money in a new dwelling. Specifically, he sold his home, which had an adjusted basis of $362,000, for $725,000. He reinvested only $285,000 in a new home. Discounting all appropriate exclusions, Judge Claiborne incurred a taxable gain on the sale of $214,000. Judge Claiborne specifically was told that he would incur a substantial tax liability because of this transaction.

The treatment of these two events on the 1980 return is astonishing. That return was prepared by Jerry Watson, of "Creative Tax Planning." After 30 years, Judge Claiborne suddenly discarded Mr. Wright, not even bothering to return Wright's repeated telephone calls. Mr. Wright was calling Judge Claiborne only for the purpose of telling him that he wanted to prepare his tax return. The Judge admits that he hired Watson without making any attempt to learn Watson's qualifications. Watson, in fact had no professional training. I submit to you, Members of this august body, that Judge Claiborne discarded Joseph Wright, and hired Jerry Watson, because Joseph Wright was too honest and too proper to create the tax savings that Judge Claiborne sought.

(Mr. Thurmond assumed the chair.)

Watson reported no legal fee income on the 1980 return. The return did not include a schedule C, where Judge Claiborne properly had reported fee income for 30 years. Indeed, the $88,000 figure for legal fee income does not appear anywhere on the return.

There is in the 1980 return, however, a schedule D, which is a form used to report a gain or loss from the sale of a capital asset. It was here that Judge Claiborne and his tax preparer created an imaginary loss, which they used to offset surreptitiously Judge Claiborne's receipt of legal fee income. Here is what they did.

First, they reported on schedule D that a transaction had occurred with respect to assets allegedly acquired in 1978 and sold in 1980. In fact, no such transaction occurred. Second, they listed the cost or other adjusted basis of the property sold as $250,000, a figure Watson admitted was his estimate of fair market value rather than cost. The estimate was based at least in part on information supplied by Judge Claiborne. Finally, they deducted an artificial sales price of $150,000, which allegedly included the $88,000 of ordinary income. From a nonexistent sale, they created a $100,000 loss. Using this method, Judge Claiborne and Mr. Watson eliminated $88,000 in taxable income in 1980, $40,000 in taxable income in 1981, and a similar amount in 1982—all in addition to a $3,000 loss actually utilized as a deduction.

The 1980 return also reported no taxable gain on the sale of Judge Claiborne's home. Through a series of purported "computational" errors on form 2119 of the return, Judge Claiborne eliminated an actual taxable gain of over $214,000. After consideration of the appropriate tax preference for capital gains, Judge Claiborne avoided over $85,000 in taxable income.

As a consequence of the fraudulent treatment of these two tax events, Judge Claiborne declared a total tax liability in 1980 of only $1,103. In other words, a man who had earned a judicial salary of over $54,000, who had received almost $88,000 in legal fees, and who had realized a taxable gain of over $214,000 on the sale of his home, reported and paid $1,103 in taxes. Not surprisingly, the return declared that Judge Claiborne was entitled to a refund of over $20,000. After consideration of estimated tax payments that were not reflected on the return, Judge Claiborne in fact received a check from the U.S. Treasury for over $44,000. Judge Claiborne cashed and enjoyed the proceeds of this check.

Through the blatant errors on his 1980 return, Judge Claiborne reported only 5.4 percent of his true taxable income. The $1,103 in tax liability that he declared was only 1.1 percent of the $97,864 that he actually should have paid as income tax for 1980.

In attempting to offer an explanation for this astoundingly false return, Judge Claiborne seeks to portray a very specific image of himself. He seeks to portray himself as a simple "country boy" with no sophistication, as an ardent civil libertarian who was unfairly hounded by Federal prosecutors, and as an overworked judge who simply had no time to read his tax return or to realize the gross errors that it contained. I respectfully submit that, while you undoubtedly will hear such claims, you should not believe them. The evidence proves that they simply are not true.

Judge Claiborne is far from unsophisticated. He was a highly successful criminal trial lawyer, and he built up a lucrative private practice. As both a lawyer and a judge, he participated in numerous cases involving tax and tax-related issues. He personally wrote at least eight judicial opinions in these cases. He instructed juries on tax-related issues in numerous other cases. By his own admission, Judge Claiborne is familiar with basic tax concepts. He understands the distinction between ordinary income and capital gains. With his education, experience and knowledge, he clearly was able to understand the concepts in the 1980 return, which are not complex.

Moreover, Judge Claiborne was familiar with the manner in which Mr. Watson stated he would prepare the 1980 return. Mr. Watson and Judge Claiborne had several discussions prior to the completion of the return, in which they discussed the sale of his home and the creation of the "loss" eventually reflected on schedule D. The initial discussions between Judge Claiborne and Mr. Watson centered around the sale of his home. Judge Claiborne had been told to expect a substantial tax liability as the result of that sale; Watson told Judge Claiborne that he believed he could "do something" about that tax liability. In addition, the two men and "several" discussions about the imaginary sale and loss eventually reflected on schedule D. Judge Claiborne acknowledged one conversation of between 30 and 45 minutes, as well as at least one additional conversation.

Moreover, Mr. Watson confirmed in writing that he could avoid the tax liability that Judge Claiborne had been told to expect. In a letter that Watson sent to Judge Claiborne in April 1981, House Exhibit 31, Jerry Watson stated that "on your home we should be able to work up a figure that would cause that transaction to be tax free." Watson confirmed in the letter that "the possibility of taking a loss on your business looks good." After Judge Claiborne received this letter, he told Watson that he wanted Watson to prepare the 1980 return. In sum, there is no basis for Judge Claiborne to state that he was not aware of the manner in which Watson would prepare the 1980 return. His claims of ignorance are inconsistent with the evidence and should fall on deaf ears.

So too should Judge Claiborne's self-serving testimony that, as an overworked Federal judge, he had no time to review the mistakes that Watson made. Judge Claiborne testified that he used the $44,000-tax refund that he received in 1980 to investigate the purchase of quarter horses in Mexico and to invest in two apartment houses. He sold one home, bought two others, and remodeled at least one. Remarkably, Judge Claiborne was not too busy for these business transactions and investments.

Faced with overwhelming evidence of willful misconduct, Judge Claiborne instead argues that he was entitled to an audit to correct the errors in these tax returns. That argument is incorrect as a matter of law. Courts repeatedly have held that, and I quote, "the filing of an administrative assessment record is not required before a criminal prosecution may be instituted . . . for failure to report or pay income taxes." In other words, and again I quote, "a grand jury may investigate and indict, and a valid judgment of conviction may ultimately be entered, for criminal tax violations regardless of whether the taxpayer has been afforded an opportunity to explain his conduct at an IRS pre-indictment conference." That is the law.

The evidence establishes that Judge Claiborne is not an innocent man who was hounded by the Government because of his ardent support for civil liberties. Judge Claiborne was prosecuted because the evidence overwhelmingly proves that he willfully defrauded the U.S. Government by making false statements on his income tax returns. His repeated attempts to divert the focus of this inquiry away from his conduct, by urging that he was the "innocent victim" of a vendetta against him, should be ignored.

The evidence in 1980 is overwhelming. Judge Claiborne changed accountants in circumstances that are highly suspect. He understated his income for a second consecutive year by a significant amount. Again there is evidence of surreptitious cash transactions. Moreover, Judge Claiborne's repeated claims that he never questioned Watson about his qualifications, that he never read the return, and that he never attempted to understand Watson's treatment of the capital gain and legal fee income is evidence, at a minimum, that Judge Claiborne deliberately closed his eyes to what would otherwise have been obvious to him. Willfulness must be found on this evidence. Intent may be established where a taxpayer chooses to keep himself uninformed as to the full extent that the return is insufficient.

On even less evidence than that heard by the Senate, a jury of his peers found beyond any reasonable doubt that Judge Claiborne willfully underreported his income in 1980. Considering the legal standard of willfulness, and the overwhelming evidence in this case, no other conclusion is tenable. Judge Claiborne must be found guilty on article II.

VII. ARTICLES III AND IV

Let me now turn to consider the allegations in articles III and IV. The arguments here may be stated concisely and briefly.

The allegations in article III and article IV each follow from the evidence that has been established with respect to articles I and II.

Article III alleges that Judge Claiborne should be removed from office because he has been convicted of two felony offenses in the Federal courts of the United States. The facts in support of this article are not in dispute. On August 10, 1984, a jury of his peers found Judge Claiborne guilty of two counts of willfully making a false statement on a Federal income tax return. The U.S. Court of Appeals for the Ninth Circuit affirmed the conviction. That same court, with 19 different judges participating, refused to grant a petition for rehearing. The U.S. Supreme Court subsequently denied a petition for a writ of certiorari. In all, at least 32 judges have considered Judge Claiborne's case. His convictions are final. Judge Claiborne presently is a Federal prisoner.

The evidence of these convictions provides an independent and sufficient basis for Judge Claiborne's removal from office. The evidence presented before the Senate establishes that the convictions are supported by substantial evidence and that the proceedings in which they were obtained were fundamentally fair and proper.

An individual who has been convicted of a felony cannot in good conscience be permitted to sit as a Federal judge. Judge Harry E. Claiborne is, and will forever remain, a convicted felon—a man who cannot legitimately preside over judicial proceedings, who cannot with any respect for decency pass judgment on other persons, and who cannot hope to maintain the trust and the respect of the American people.

The House of Representatives submits that judgment is appropriate on article III. Through his convictions for a felony offense, Judge Claiborne has violated the public trust. He has earned a mark of shame, which the evidence proves is sadly but unequivocally deserved. That stigma—his felony convictions in a Federal court—provides a legitimate and sufficient basis for the Senate to determine that he should never resume the Federal bench.

Article IV alleges that Judge Claiborne should be removed from office because he has "betrayed the trust of the people of the

United States and reduced confidence in the integrity and impartiality of the Judiciary." The allegations of article IV rest on the same evidence adduced in support of articles I, II, and III. The allegations have been proved by overwhelming evidence. Conviction on article IV, however, rests on a separate and compelling legal theory, which has roots deeply embedded in the impeachment power. In 1936, the Senate convicted Judge Halsted L. Ritter of bringing disrepute upon the Federal judiciary that he had been chosen to represent.

Through his actions, Judge Claiborne also has brought disrepute upon the Federal judiciary. In 2 years, he failed to report over $190,000 in taxable income. He cashed large fee checks at local casinos. He used the tax refund that he received to investigate quarter horses in Mexico and invest in real estate in Las Vegas. The evidence consistently and persuasively demonstrates that his actions were deliberate, purposeful, and willful. When confronted with his crimes, the evidence suggests that Judge Claiborne—and this is what the evidence suggests—lied under oath. He has refused to resign his office. He has continued to collect his salary while in prison. He has drawn scorn upon himself and the Federal judiciary that he represents.

As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch who hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with this special prerogative of judicial independence comes the most exacting standard of public and private conduct. As Congressman Norris noted during the impeachment trial of Judge Robert W. Archbald in 1913—

> When public officials disregard their duty and violate the common standards of propriety with impunity, the standard of our citizenship is lowered and the very foundation of our government is threatened. Of all the Departments of Government, the judiciary is, and ought to be, held in the highest regard. Our Government can not perform its full destiny unless the courts are above reproach and the judges above suspicion.

Judge Claiborne has spoken in these proceedings about honor. The American people have their own simple concept of honor. Honor in the eyes of the American people lies in the voluntary payment of one's taxes, not in misstating income and counting on an audit. Honor in the eyes of the American people means accepting and admitting the overwhelming evidence of guilt, not attempting to blame two different tax preparers and then lying under oath. Honor in the eyes of the American people means resigning upon conviction in a fair and valid proceeding, not continuing to collect a Federal salary while in prison. Honor in the eyes of the American people lies in public officials who respect the law, not in those who violate the trust that has been given to them when they are trusted with public office.

Judge Harry E. Claiborne has, sad to say, undermined the integrity of the judicial branch of Government. To restore that integrity and to maintain public confidence in the administration of justice, Judge Claiborne must be convicted on the fourth Article of Impeachment.

CONCLUSION

Respected Members of the Senate, the responsibility which has been placed in us as managers to present this impeachment to the Senate is not a pleasant one. In fact, it saddens us. And indeed, this is a sad day for our Nation, for a Federal judge has defrauded the Government of over $100,000. He has been convicted of these crimes. He continues to press arguments that fail to respond to the evidence. He continues to press explanations that defy common sense and logic. As a result, the Congress of the United States has devoted countless hours and thousands of dollars to this impeachment proceeding. I invite you to listen one more time to Judge Claiborne's explanation, but when you listen, listen critically and carefully. His explanation will fail to address the evidence, and fail to explain Judge Claiborne's egregious conduct.

On behalf of the people of the United States, and on the basis of the evidence that has been adduced, the House of Representatives submits that the Senate should convict Judge Claiborne on each of the four articles of impeachment. Judge Claiborne must be removed from office.

The PRESIDENT pro tempore. Chairman Rodino, I have been requested to propound a question to you by the distinguished Senator from Alabama [Mr. HEFLIN]. The question is this: Would a conviction under article III based on the fact that he was convicted by a court of competent jurisdiction of a felony set a precedent that a judgment of acquittal on a felony is a complete defense?

Mr. Manager RODINO. I do not believe that that could be the case. It would not set such a precedent. I believe again the Senate, as the body that is the trier of the impeachment, must consider the impeachment on the basis of the facts before it.

The PRESIDENT pro tempore. Thank you.

Thank you, Mr. Managers Rodino and Fish.

Mr. Goodman, have you determined whether Judge Claiborne will participate in the summation?

Mr. GOODMAN. Mr. President, he intends to. I shall, with the President's permission, make the opening address.

The PRESIDENT pro tempore. You may proceed.

Mr. GOODMAN. Thank you.

Mr. President, Senators, it is easy in retrospection to say that the leopard has changed his spots. But as the triers of fact and of law in this trial before the U.S. Senate, common sense must prevail in helping you make your decision as to whether or not you are going to vote for conviction of a fellow citizen, who attained the highest position available to a member of his profession as an article III Federal judge, based on the evidence which has thus far been adduced.

Judge Claiborne, the evidence reflects, has been characterized as a man—and this evidence goes unrefuted; there is not one piece of evidence to the contrary during the presentation before the committee formed pursuant to rule XI—whose character trait for honesty and integrity, for truth and veracity, was impeccable. Brought before the committee, and whose testimony was not summarized in the Ethics Committee summary of the evidence, were numerous character witnesses, gentlemen who were former prosecutors, were former States' attorneys, who were members of the bar of the State of Nevada, who testified that Harry Claiborne as a judge was the fairest of judges, who gave all litigants who testified and came before him the benefit of every doubt and every courtesy, and if the verdict was such after a fair and full trial that they were found guilty, he would impose a stern sentence.

He asked for no less as far as his own destiny was concerned but received far less because he did not get the type of trial which is being relied upon by the House managers which he would have provided to a fellow citizen.

These witnesses testified that Harry Claiborne was a gentleman whose whole life was devoted to concepts of fairness and justice, concepts which assured the integrity of the U.S. Constitution and all of its protections to be afforded to those who came before him. Harry Claiborne was deprived of those very principles to which he dedicated himself every living day.

Harry Claiborne, at one point during the course of my representation of him, objected to my characterization of his personality as being unusual, because he saw nothing unusual about his lifestyle and the way he conducted himself while he was an attorney and then as a judge. And I said, "Judge, people don't do what you do and expect to go uncriticized for it." And he said, "What do you mean?" And I said, "Judge, people don't keep a $50,000 cashier's check in their drawer for over a year not earning any interest on it."

That is what Harry Claiborne did, and the record will support it, while he was a judge and supposedly in need of the moneys, as the prosecutor during the criminal trials and the House managers would suggest.

And I said, "Judge, people don't keep $100,000 which you receive from a grateful client in a safe deposit box in a casino without drawing any interest and then, upon being appointed to the Federal bench, make a deposit of $75,000 cash of that $100,000 in a bank account in order to satisfy your tax obligation." I said, "People don't do that, Judge, and that is going to be suspect as far as the evidence is concerned."

And he said, "Well, on hindsight, maybe it is a bit unusual but while I was doing it, I didn't think there was anything wrong with it." And I said, "Judge, people don't get a $44,000 check from the Internal Revenue Service, from the Department of the Treasury, as a refund and go to the Golden Nugget Casino in Las Vegas, NV, and cash that check if you are trying to conceal your financial affairs from the Government who has conducted a vendetta against you."

And he said, "That's not the reason I went to the Golden Nugget to cash a check. It was convenient. It was convenient for me to go there with a $44,000 check and cash the check." And yet the same prosecutor who said that there was something unusual about Judge Claiborne keeping $100,000 in a safe deposit box in a casino didn't have the answer as to why the same judge would take an IRS check, which he characterized as a badge of fraud, and cash it at a local casino.

What does this show? It shows a man who really wasn't concerned about trying to protect himself at a time when he should have been trying to protect himself. Harry Claiborne is a man 69 years of age, and while he is here and he doesn't complain about it, it is important that you understand what kind of man he is because he does not complain, as he sleeps in the brig at Quantico in an isolated lockdown on a mattress which is an inch thick. He doesn't complain because he's getting what he desires to achieve by virtue of having this presentation, and he's hoping that the evidence will be opened up so he can expose what is wrong as far as the executive trying to intimidate and chill an article III Federal judge.

He knew from the very moment that he took the bench in Nevada that he was such a target. He tried to have this expressed before the juries that tried him in Reno NV, and he was deprived of that opportunity. So for the House to say that he received a full and fair trial, he has not received one yet. He's waiting for the day that he's going to get a full and fair trial so he can expose the wrongs and the egregious activity that he's been subjected to. Harry Claiborne is 69 years of age, has lived a life which is admirable, which has caused those who are defending him to defend him pro bono, because they believe that he's one of the few Federal judges who would stand up to an oppressive executive branch and call it the way it was, and he has to be repaid for that.

And mistakes, not willful activity but mistakes caused by himself—he's never said he hasn't participated in the creation of the problem—caused by himself because of his inattentiveness to his tax concerns, based on sloppy preparation and based on sloppy recordkeeping, that it is not enough to have resulted in a conviction and it's not enough to have a man of his background and of his impeccable reputation as a judge doing the things that judges do best to be found guilty in an impeachment proceeding. Judge Claiborne may have acted negligently, may have acted grossly negligently but he did not act willfully.

The courts have coped with the concept of willfulness as it has developed over the years. Maybe one court says willfulness is an act with bad purpose and another court says it is an intentional effort to violate a known legal obligation. But the bottom line of willfulness is that the taxpayer had to have attempted to avoid his responsibility knowingly, with some purpose to violate a known legal obligation.

In this particular instance, on the facts of this case as they have been presented to the committee, under the certain circumstances that the committee conducted their reception of the evidence, I submit to you and each of you that willfulness was not proved; and anything less than that, any standard less than that, does not satisfy the burden which was assumed at the inception of the proceedings by the House managers, where they said: "You can count on the fact that we will not deviate"—because I asked for a bill of particulars concerning this, and they said: "We will not deviate from our position that we can prove, by whatever standard of evidence the Senate wants to apply, that Harry Claiborne acted in a willful manner."

Harry Claiborne was educated in Arkansas. He comes from a humble background. He worked his way through school. He served this country well in the Armed Forces. At the conclusion of his service, he went to Las Vegas, NV, when Las Vegas was a small, friendly community, where a man could not specialize in any particular aspect of the practice of law but, rather, had to be a general practitioner.

He held himself out to the populace of Las Vegas as a man who wanted to be a good lawyer. He worked in the district attorney's office, and he served the community well. He was elected to the State assembly, and he served the community well. He went into private practice, and he handled all types of cases; and to this day, he receives letters and commentary from people who said: "I remember Harry Claiborne. Harry Claiborne is the man who, when I was being operated on at the hospital, stopped and said, 'You'll be all right.' Harry Claiborne is the man who, when I couldn't afford to pay the fee said, 'I'll represent you for nothing, and when you can pay me, bring the money by.' "

Harry Claiborne was interested in only one thing, and that was that the citizen he was representing would be represented in the best manner, the best tradition of the profession, whether the individual could pay or not. Harry Claiborne was not interested in the monetary aspects of the practice of law. But because he worked hard, he was rewarded financially for his efforts.

He began to represent high profile clients. He represented movie actors and movie actresses, and he represented unpopular people.

He and I, at one point in time, represented a fellow who was charged with a sexual assault on a little girl. I will never forget, I took my wife to the supermarket one day and somebody said, "Are you representing this undesirable—" using expressions far worse than that, and virtually spit in my wife's face because her husband was representing somebody of that ilk and that nature.

That does not mean to say that Harry Claiborne, when he represented unpopular people, had to like those people, although I can assure you he found something good in everybody he represented, and he formed a relationship that they knew they could be truthful with him and he would not sell them down the river.

Harry Claiborne represented these people to the best of his ability, and he represented reputed members of organized crime. He developed a reputation as giving no quarter, but he was going to make sure that these unpopular persons received the same constitutional guarantees that any other citizen would receive, and it did not matter what they were being labeled but, rather, he was going to make sure that the Constitution applied equally to them.

During the course of representing these types of people, the unpopular and the hated, Harry Claiborne made enemies along the way, and he knew it. These were not secretive enemies. These were people who came right out and said, "We don't like you, Harry Claiborne."

Then, in 1978, something happened in his life that was his goal. He took a position which meant more to him than maybe the lady and gentlemen in this Chamber can understand what it is like to attain, a lifelong ambition. He became a nominee for a U.S. district court position for the district of Nevada. He was sponsored by Senator Paul Laxalt and Hon. Howard Cannon, who is at this time participating in his defense.

He took the position because he wanted to make a lasting contribution to the profession that he dedicated his whole life to. As an aside, I can tell you that as a practicing attorney he worked as hard as any lawyer I have seen. We have tried cases together, and we worked Saturdays and Sundays and into the night, and the hours melded into days and the days into weeks, and it did not matter. It was not a matter of counting the dollars that were being made. It was a matter of accomplishing the result that the profession obligated us to perform. He did it without any conception that he was in the practice for the purpose of making money.

As a lawyer, before he ascended to the bench, Harry Claiborne had a law business. Many of you Senators were in the private practice of law, and when you have a law business, you run it not only as a profession but as a business, and you set up certain protections as far as reporting your income is concerned. Harry Claiborne, in fact, set up such mechanisms in his office. He realized that the least important thing to him as a lawyer was to account for the moneys that were being earned.

What did he do? He said to his secretary, "Send all my bank statements to Joseph Wright"—Jay Wright, his long-time accountant, who had been his accountant for a 30-year period—"and have them go directly to Mr. Wright's office, and send over my receipts to him, and send over everything to him so he can prepare the return."

Jay Wright had one standing directive from Harry Claiborne, and that directive was, "If there is ever a question about an item that you have before you, treat it as income, because I don't want a problem with the IRS." Because when Judge Claiborne was Attorney Claiborne back in the 1960's, he underwent an audit by the IRS that was disruptive, and he never wanted to go through an experience like that again; and he instructed his tax accountant to report every cent and—in the words of all the witnesses who can testify to it—"Give the IRS, give the Government, the benefit of every doubt."

That is what he did, and he reported this income to his accountant, and he trusted his tax preparer to file an appropriate return. Harry Claiborne made his disclosures to his tax preparer, and he relied on the tax preparer preparing the return in a manner which was consistent with good accounting practices.

The trust went so deep—and, once again, it is easy for us to be critical of the man on hindsight—but the trust went so deep that on more than one occasion he signed his tax returns in blank. Shame on him and shame on his accountant, who permitted him to sign the returns in blank. But it was not done with any malice or willfulness or any intent to violate a known legal obligation. It was just a matter of trust between himself and his tax preparer.

The record is unrefuted that in 1978, which was an original year in the indictment in this case, which was ultimately dismissed by the Government after the first trial ended in a hung jury, Harry Claiborne, when he was assigned by Chief Judge Browning on the ninth circuit to sit on a case in Washington, knowing he was going to be out of the community, signed the return in blank; and Jay Wright filled in the return and filed it with the Government, and the tax obligations were satisfied.

The same procedure was followed in 1980 for the preparation of the 1979 return, when Harry Claiborne knew that he was going to be assigned to Los Angeles on this judicial function, and he signed the return so it would be filed in a timely manner.

Now, it is crucial in ascertaining whether or not Judge Claiborne acted willfully to understand, as I tried to give you some flavor about this morning, what the community was like in Las Vegas, NV, at the time that he provided the information to his tax preparer, a matter which is glossed over and it is so easy to do it when you look back some 4 or 5 years and you try to reconstruct events, and it is unfair in many ways when that type of process is used when you say that Judge Claiborne provided Jay Wright with information about his financial condition and about fees earned and you gloss over the fact that that information which was provided to Mr. Wright in March 1980 was not for his tax purposes. It was for the purpose of a letter to be written to have a mortgage guaranty, and Judge Claiborne indicated that the mortgage company wanted to know what his income from private practice was, and Judge Claiborne said based on a very cursory review of his records and thinking about his financial condition he writes to his accountant that his fees earned from his private practice, and this isn't fee splitting and, as I said before, this was money earned by Judge Claiborne when he was in private practice, he said, "I earned $46,000 from my private practice."

That was more money than in fact he did earn, but that information wasn't even being provided to Mr. Wright for tax purposes. It was being provided for a purpose completely separate and apart from that.

Then just a little bit later when I indicated to you that the search and seizure took place in the strike force office where he was characterized as an "ayatollah," where he was condemned by the Executive, where he was advised in the media that he was going to be a target and was targeted for an indictment by a grand jury for something that he had nothing to do with whatsoever and he lashed back at them on April 9, 1980, indicating that in fact they were a bunch of bastards—pardon the expression, because that is what he called them, and it was reported as such in the media, certainly not a shy effort on his part and not one which would not incur the wrath of the Executive.

Judge Claiborne 2 days later writes the letter for tax purposes for the first time providing information to his tax preparer for tax purposes where to the very penny he advises the tax preparer what he earned from his private practice and relied on the tax preparer to prepare a return which was consistent with good accounting principles. That is where his defense was on the issue of willfulness.

And to suggest once again using our common sense that he would do anything to defraud or do anything which would be considered to be willful concerning the providing of this information to the preparer, I think borders on the incredulous; it makes no sense because the one thing the record does suggest is that Judge Claiborne is not a foolish person. He may have been a careless person. He may have been negligent or grossly negligent. But he certainly was not the type of person who was acting in a manner to commit an offense against the United States.

In the trial—in the trials I should say—the trial court would not permit any evidence to go to the jury concerning the atmosphere of the Las Vegas community as it applied to Judge Claiborne and, in fact, what the jury had before it in making its determinations were the two barebone tax returns for 1979 and 1980 which when taken out of context are in many ways inexplicable, but placed within a context certainly the trier of fact had to take into consideration that somebody who had the type of heat on them, the type of vendetta against them, the type of pressure against them would not engage in any activity which would be considered willful, and because of that the prosecutor from the public integrity section, who was prosecuting the case, and the agents who were preparing the witness and the witnesses from the IRS and FBI, they knew that the truth could not come out and they created a scenario which was suggestive of the proposition that in fact there was no delivery by Judy Ahlstrom of the April 1, 1980, letter wherein the judge declares his entire fees earned from his private practice.

And even though we were able to show without any equivocation that the letter was consistent with the other documentation which you, as Senators, have before you in volume 4 to the effect that there was an $8,000 check written to the IRS with a certain number affixed to the check and a W-2 which was submitted at the same time, along with this letter, and then later on that same day there was another check written for $2,500 by Judge Claiborne with a number next in seriatum to the one for $8,000, notwithstanding that, it wasn't enough to overcome their position that there was some type of scenario created where Judy Ahlstrom was in fact lying to the jury.

But what has happened as a result of this public inquest? People who became aware and familiar with the allegations that were being made, seeing it on television and reading in the newspaper, came forward and they said wait a second, wait a second, said Ken Swanson, "I was in Jay Wright's office on the day that Judy Ahlstrom did deliver a package, and somebody said 'there's Judge Claiborne's secretary, she's delivering an envelope here'." Then we talk about the accusation that documents are being created.

We get a phone call, my office receives a phone call, from a woman out of nowhere for the first time saying that she worked for Jay Wright and she knows of her own personal knowledge that Judy Ahlstrom brought in an envelope that day.

So all of a sudden Judy Ahlstrom is corroborated, and it is not placed in a position where they can criticize her credibility, a young lady who—and I submit anybody, anybody in the world to refute this—a young lady who when she was testifying at the trial in Reno was petrified, was terrorized by the trial court and she expressed that to the committee pursuant to rule XI, and she said she was able to come forward now and express herself in a more credible manner because she was not afraid anymore.

This was a constant recurring theme—they weren't being intimidated anymore, they felt comfortable to let the truth come out. So Judy Ahlstrom now, according to the concession on the part of the House managers, is not being called a liar anymore.

Now the story is being shifted a little bit, OK, well, nobody ever said that she didn't deliver the envelope, nobody ever called Judy Ahlstrom a liar anymore. All we are saying now is that the letter which she testified to under oath, swearing to God about, that the letter wasn't in existence at the time on April 11, 1980.

I submit to you that if you believe Judy Ahlstrom in one aspect of her testimony, you have to believe Judy Ahlstrom in another aspect of her testimony unless you can show that she lied in one aspect of our testimony and then you have the right not to believe her in all aspects of her testimony.

And Harry Claiborne provided this information to his tax preparer; and unfortunately, once again, when you try to put together the shattered egg and have sense made out of it, 4 years back, it is so very difficult to come up with smooth-fitting explanations because you weren't preparing at the time that the events were taking place to defend against conversations that took place between Jay Wright and Harry Claiborne over the phone where they were exchanging information, and you have Jay Wright who is ready to testify to anything during the trial up in Reno, during the second trial in Reno, during the hearing before the rule XI committee because the gentleman says, and I don't hesitate in saying it, he says, "I don't remember anything,' he says "I have no independent recollection of any fact whatsoever," and what we did as we sat down with Agent Skelton of the IRS, Agent Skelton who is my friend now, and we spent maybe not 100 hours, I think the proof is before the committee 45 to 50 hours together. And when Wright came back to testify before the committee who did he call up to go to dinner? Not Oscar Goodman. He called up Mr. Skelton. He wanted to go out to dinner with Mr. Skelton. But they didn't discuss the case.

And I ask you, if you are not going to hear live testimony to see who is telling the truth, see who is telling the truth as far as the presentation is concerned and the way Mr. Skelton reacted under cross examination, see whether, as the House managers said, he was sitting there and not sweating and not moving his hands like that.

I submit to you that if the camera was on him, he was scared to death because he knew he was not telling the truth. He knew he was lying. That is the type of person who is preparing this person, Mr. Wright, who had no independent recollection. And that is the truth. And I address the verdict on that truth.

And Mr. Wright says, after he is being interviewed during these 40 to 50 hours by the representatives of the Internal Revenue Service and the strike force and the public integrity section, who don't have any notes, who violated every statute and regulation concerning the preparation of memorandum, who just willy-nilly worked with this man to create his testimony, they all take the position that at no time did Mr. Wright indicate anything other than the fact he could not have lost, could not have misplaced the April 11, 1980 letter.

And it was not until the national inquest began when Mr. Swanson, Ken Swanson, came forward and he indicated, he said: "Wait a second. Couldn't have misplaced anything? Couldn't have lost anything? My goodness, at this point in time, Wright's office was burglarized on four or five occasions and nothing of value was taken. I think at one time he testified maybe a calculator was taken. The rest of the time it just looked as if somebody was looking through files. There were files on the floor and we really couldn't tell what was missing and what wasn't missing because we did not have any catalog system."

And that was consistent with the woman who indicated she called. Judy Ahlstrom brought the letter because they were looking for something, Mr. and Mrs. Wright. After the letter was brought in, for the next several days they wanted to know where that file was, there was the material that Judy Ahlstrom brought in. And they looked everywhere for it.

So to suggest, as was suggested during the criminal proceedings and the inference which the House managers ask you to draw, that there was some lie about Judge Claiborne's disclosing all of his income in private practice to Jay Wright, I believe is patently unfair. It is an unfair characterization and does not help achieve the truth in this factfinding process.

And the return went in. And there is no question that there was income omitted on the return, but the question is, when you take Judge Claiborne as a person whose character for honesty, integrity, and truth and veracity has gone unchallenged, with his background, you ask yourself, was it an intentional, willful act on the part of Judge Claiborne or was it a negligent, careless act on the part of Judge Claiborne? Did Judge Claiborne have a right to rely on his long-time accountant? Did Judge Claiborne advise his long-time accountant of the fees received from his private practice?

And I submit, at the conclusion of weighing all of this evidence, no matter what standard you use, either that of reasonable doubt—which I urge you to adopt, that type of doubt which makes you hesitate in the most important of your own affairs—or whether you use a lesser standard or you vote your conscience, whatever is your prerogative as U.S. Senators, I submit to you that under that set of facts you can't in good conscience vote for a conviction on count I of the Articles of Impeachment, not when the evidence strongly suggests that the judge did what he did without the type of willfulness which is required by the allegations in article I.

Judge Claiborne developed a new enemy—and once again these are not pleasant allegations to make, but they are real allegations and they are allegations that we have never been able to litigate. We have never been able to have a forum where we could put a former member of the executive branch, Joseph Yablonsky, a special agent in charge of the FBI office in Las Vegas, under oath and ask him whether or not he set out to get Judge Claiborne as part of his vendetta against Nevada and Nevadans and the Nevada community and his effort to plant the flag, the American flag, in the desert. We have never been able to ask him about this.

But Judge Claiborne knew. He knew, and if you will permit us to bring our witnesses forward we would be able to prove to your satisfaction beyond a reasonable doubt, he knew that Joseph Yablonsky was invading and encroaching upon Judge Claiborne's liberty and lifestyle and touching those around Judge Claiborne in an effort to substantiate charges against Judge Claiborne.

I told you about this attorney that I represented who was offered $50,000. All he had to do was give it to Judge Claiborne to fix the case; didn't matter whether it went directly to Judge Claiborne, it would have gone to me and I could have passed it on to Judge Claiborne and this would have satisfied Joseph Yablonsky because then he would have had Judge Claiborne.

But this particular attorney from Miami indicated he wasn't interested; he didn't believe anybody would get involved in that kind of activity. And, interestingly enough, this attorney had as an employee at one point in time in his office in Miami the wife of Joseph Yablonsky acting as his secretary.

And there was another individual whose relationship to Judge Claiborne has not been developed here for your consideration, and that is a gentleman by the name of Eddie LaRue. Eddie LaRue was a private detective and Eddie LaRue was the private detective who supposedly had setup these bugging devices which Judge Clairborne was being investigated about, which caused the headline in the prior year, 1980, in the newspaper, saying he was the target of a grand jury investigation.

Eddie LaRue was not as fortunate as some of the others who were being stalked in order to get Judge Claiborne. Eddie LaRue was indicted and the prosecutor who prosecuted him was not a Nevada prosecutor or was not a member of the U.S. Attorney's Office but rather was a public integrity section attorney who was sent out from Washington, DC, not because he was sent out to prosecute Eddie LaRue, but because he was sent out to get Judge Claiborne, because he had no jurisdiction over Eddie LaRue. He had only that jurisdiction over some Federal official who was being targeted by the executive branch of government. Eddie LaRue was offered a sweet deal.

They said, "Eddie, you don't have to go on trial in Reno." Right before it was supposed to start, 3 days before the trial was supposed to start, they moved the case out of Las Vegas and deprived him of all of his character witnesses and took him to Reno where the judge was brought in to try the case from Salt Lake City, UT, and completely disassembled LaRue's defense mechanisms. He went up there to Reno and he was offered a deal where he could escape the prosecution, the unpleasant experience of having to defend oneself in a court under indictment and was told, "Eddie, we won't push for the 25 years if you give us Judge Claiborne," And Eddie said, "I have nothing to give you on Judge Claiborne." And, fortunately for Eddie LaRue, Eddie LaRue was acquitted by that jury in Reno.

Chuck Lee was a detective with the Las Vegas Metropolitan Police Department. Chuck Lee was approached by Harry Claiborne when Harry Claiborne found out he was under investigation for this illegal bugging activity. And Harry Claiborne said to Chuck Lee because he was such a good polygrapher, the best lie detector in Nevada, Harry Claiborne said, "Give me a lie detector test. Make sure that I can bring documentation to somebody to show them that scientifically I am telling the truth."

And Harry Claiborne took the lie detector test and, of course, he passed the lie detector test and took the results. And when the Federal Government found out that he had the results about the lie detector test, they went after Chuck Lee and they accused him of creating another fraudulent document, another phony set of documents because, apparently, anything that Harry Claiborne came into contact with had to be fraudulent, had to be phony, when the Federal authorities were characterizing it.

And Chuck Lee was able to show that his work product was of course legitimate but while showing that he was punished, too, and he was demoted from his high office to that of a desk sergeant with the police department.

I am not going to go on and on telling you about each one of these people, but there is one that is pretty important. That is the District Director of the Internal Revenue Service for the District of Nevada, a gentleman by the name of Gerald Swanson. Gerald Swanson was approached to OK the tax reduction on the tax liability of Joseph Conforte that I indicated to you this morning, the $16.5 million reduction in order to have Conforte testify against Judge Claiborne. Swanson said he would not believe Conforte, and he wasn't about to engage in that type of activity. So what happened? The Internal Revenue people went beyond Swanson, went around him, and they got permission from other persons within the Internal Revenue Service to make a deal with this panderer and procurer in order to get Judge Claiborne. They set up a sting operation for Swanson. And he did not buy the sting. But that didn't end there because Gerald Swanson found himself being drummed out of Nevada from the district director's position to some type of collection job in Dallas, TX, away from his wife and away from his family. They broke his life in half as well.

There was one after another of the people who were in jail who were approached by representatives of the executive to give them Harry Claiborne, and they had the key to their own cell. They could walk out. And there is an attorney who I wanted to call as one of our witnesses who didn't know Joseph Yablonsky from Adam, who came into Nevada with a friend of his and went to Yablonsky's office and after being there about 5 minutes Joe Yablonsky, to a complete stranger, pointed to his wall and he said, "You see that empty space there? That is where I am going to put Harry Claiborne's picture." And all of the other pictures on Joe Yablonsky's wall had victims of his targeting activities throughout his career as a 20-plus-year agent with the FBI, and it had a blank space there that he told a complete stranger he was going to put Harry Claiborne.

With that state of mind that Harry Claiborne purportedly, according to the theory of the House and according to the theory of the prosecution during his trail, indicated that he engaged in an act of willfulness. I submit to you that under those circumstances Harry Claiborne knew full well that he was going to be a target, and it belies once again fragility. It just is impossible for one to conclude that he was engaging in an intentional lack of willful act an act of bad purpose, an act to violate some known legal duty when he participated in providing the information to his tax preparer for the preparation of his 1980 return.

Now, you are being asked to draw some inference from the fact that Judge Claiborne switched accountants. Once again, Judge Claiborne wasn't preparing a defense for an impeachment proceeding or for criminal prosecution. Judge Claiborne was with a former wife of his in 1981, a woman he felt a great deal of affection for, who utilized the services of Jerry Watson. And she went to Jerry Watson's accounting office, and she delivered some papers to Jerry Watson.

Judge Claiborne didn't go up with her when she delivered these papers but when she returned she said "Harry, my accountant would like to meet you." Now, there is nothing untoward or illegal about that. There is nothing untoward or unseemly or illegal to change your tax preparer. Judge Claiborne's needs had changed from the time he had his business where he was reporting all of these checks received in the normal course of his business, and he did not have that type of accounting bookkeeping need any more.

He got a couple of checks as a result of income earning in his private practice. I believe only four checks for the year of 1980 were received in 1981. He received his check from the Federal Government. He cashed some of these checks at the Las Vegas casinos.

As I indicated to you before he cashed the $44,000 refund check that he got in a Las Vegas casino. So to draw some kind of inference once again that there is something unseemly or untoward or nefarious about cashing checks in Las Vegas, NV, is I think completely unfair under the circumstances. It won't happen in Philadelphia, PA. It may not happen in Omaha, NE. But in Las Vegas, NV, these casinos are virtual banks. There is nothing wrong with somebody going in where they are known to be able to cash a check anytime day or night. There is no obligation. There is no legal requirement.

They can do your financial transactions at a bank, and Harry Claiborne has no obligation to account for where the moneys went and where they were spent. It is not a crime to cash a check. It was not a crime for him to cash a check that he received as part of a fee, and it was not a crime for him to cash a check that he received as part of a refund.

What he did is he met Jerry Watson. I think it is important for one to judge Jerry Watson either on a video tape or in person because you will see a fellow who has an answer for everything. He is a jack of all trades. Judge Claiborne was introduced to him and recognized him as being a fellow member of the Baptist Church. They had seen each other. When Judge Claiborne was in his office, he heard Watson talking on the phone. Watson puffed, and he impressed the caller. And Judge Claiborne listened to him, and rightfully or wrongfully—and upon reflection wrongfully, but not willfully—Judge Claiborne was impressed by Jerry Watson.

One would say, how could you be impressed by Jerry Watson? How could you be impressed by this man who doesn't know anything about anything and yet holds himself out as an expert on everything? I think the committee members under rule XI were scratching their head. How can you rely on this Jerry Watson? Well, Harry Claiborne wasn't the Lone Ranger because when the evidence was finally brought out and was brought out for the first time and never brought out in any of his trials, and of course that doesn't matter as far as I am concerned, and I submit to you that your determination is an autonomous determination as the trial of the Senate. But Jerry Watson didn't have just one professional client. He had plenty of professional clients. The record shows he represented businessmen and prepared their returns, that he represented doctors and he prepared their returns, and what happened as a result of all of it? Jerry Watson ended up in an involuntary bankruptcy because he got everybody in trouble who touched or came into contact with him in addition to Harry Claiborne.

But these other folks weren't indicted because they didn't have the vendetta going with the United States executive. Harry Claiborne was indicted. He was not contacted by the IRS. You want to talk about frame of mind and you want to talk about the circumstances in a particular situation, I researched because Senator HEFLIN had queried what the procedure was concerning who makes the determination as to whether a matter is handled civilly or criminally, whether it goes under one or whether it goes directly through indictment as far as the IRS is concerned.

I researched it the best that I know how. I contacted representatives of the IRS and people who specialized in criminal tax practice. The bottom line, as I understand it, because we have not been permitted to bring in an expert here to ask the question, is that it is discretionary, that it is in the decisionmaking process of the investigators. And they made that decision.

Can you imagine somebody who was acting willfully, can you imagine somebody who was acting willfully with an intent to cheat his Government to defraud, to get away with something, to hide when he knows he is a target, can you imagine him signing a tax return which was in pencil, which had arrows pointing on it, "type here" which kindly is described as an abomination? Not willful. Foolish maybe, careless, maybe not even with the intention to think it was the final product, 4 or 5 years later to explain why you signed a document, and to come up with a logical explanation of it when you had your instant immediate problems and concerns and work, at the time that the event took place where you cannot reconstruct an answer which is palatable, when you are sitting back, you are calm, relaxed, and you thought out the process.

Why did he sign that? I do not know. I would not have signed it. But I sure would not have signed it if I was looking to cheat my Government because it was a red herring. It was a flag that said, "If you want to get me, here it is, come and get me," because the return was horrendous.

But interestingly, because we are asked now for the first time in my proceedings to find that Harry Claiborne willfully cheated on his return as far as the real estate treatment on the return, I think it is the 2119 form, the first time that we are asked to find that he did something wrong willfully, with bad purpose, with a knowing intent to violate the law, believe it or not after two trials in Reno, with Government experts sitting down and culling over and looking at the document and trying to examine it and being critical of it. Two trials in Reno and not one Government expert picked up that there was anything wrong with the treatment on the return of that particular real estate transaction, not one.

We had a tax lawyer who was representing Judge Claiborne during the case. He did not pick it up.

We had multiple Government prosecutors and IRS agents. They did not pick it up.

For the first time, before the Senate rule XI committee, it was picked up, and I submit to you that that is not the type of situation which suggests a finding of willfulness or bad purpose on the part of the taxpayer.

Now, what did Judge Claiborne do?

During the trial and up until, once again, when we come before the Senate when we were able to show, because witnesses are not afraid of coming forward and bringing all the evidence before the trier of facts, before the committee who was receiving or sifting through the evidence, we find for the first time that now—well, let me go back because I have to tell you what happened during the two trials.

During the two trials, once again Judge Claiborne was accused of phonying up some document, of creating some document for purpose of escaping conviction. The suggestion was clear that on the $88,500 which he provided to his tax preparer which represents virtually the very figure—a little higher—the amount earned from his private practice, for the first time it is conceded by the House, for the first time because it has always contested it, for the first time it is conceded that the $88,500 was provided by Judge Claiborne to his preparer and there was never any question about it.

The reason for that is this: Because Watson indicated that the $88,500 had been given to him, but Watson, because of the fact that Watson is incredible, Watson could not be believed. But our Government, our executive branch of the Government and the prosecutors, had within their possession at the time the case was tried in Reno, NV, a statement from Charlotte Travaglia, Watson's assistant associate, where she indicated that she had that figure within her possession, and they show that Charlotte Travaglia would not talk to Claiborne's lawyer because she believed that she was a prosecution witness and was precluded.

It was never brought to our attention, and Charlotte Travaglia was never brought forward as a witness at the trials to testify that this fact that was contested was, in fact, an untrue fact. That was withheld.

I submit to you that not only was it withheld by the executive but like so many of the other documents where people do not want to hear these things once again, where things were placed under seal and provided to the trial court and should have been provided to the defendant so that an appropriate defense could have been raised for Judge Claiborne, that envelope with these documents, believe it or not—and that is why I have to take issue with this concept of article III, that Judge Claiborne received a full and fair trial because he received a proceeding far less than that—that envelope that has exculpatory material in it was not opened by the trial judge, and when the special panel—because everything with Harry Claiborne is special—when the special panel was appointed from parts of the country other than the ninth circuit and they sat and reviewed the proceedings to determine whether or not Harry Claiborne got a fair trial, they did not open up that sealed envelope.

The first time the sealed envelope had ever been inspected has been an in camera inspection as a result of our moving for it, and the committee under rule XI receiving it. We have been advised that an independent in camera investigation was made. That is the first time.

So I do not want to hear about fair trials. The only fair trial that Harry Claiborne is ever going to get, if he gets one, will be before the U.S. Senate, because he has not received one yet.

Not only did Harry Claiborne provide for his tax preparer the figure of $88,500 but he did far in excess of that. He provided the tax preparer, as any other taxpayer would under the circumstances where he was going to a new tax preparer and wanted a complete review of his tax situation, he provided him with returns going back—he really could not understand why Watson wanted it but he gave it to him anyhow even though it seemed like an unusual request—the tax returns going back to 1973.

He knew that Watson said he was going to review everything and get the best possible return for the taxpayer. We all try to do that.

Once again, Harry Claiborne said to Watson and the evidence does not refute it as far as this is concerned, "Make sure that everything is done properly because I got enough problems. I got enough heat with the FBI. I don't need it with the IRS."

That goes to the issue of willfulness. Harry Claiborne gave Watson escrow instructions, briefings, sales agreements, trustees, promissory notes, contractor agreements, canceled checks, bills, invoices, tax returns, everything, so that Watson could prepare an appropriate return.

Watson held himself out to Judge Claiborne as having two fine accounts, one account handling over a million dollars. That was the kind of accountant that was taking care of Judge Claiborne's return. Watson promised Judge Claiborne, and this is the cruelest joke of them all, "Don't worry, Judge, the returns will not only be prepared by the tax preparers who work for me who have the expertise, but I am personally going to supervise it."

Well, he supervised it and he permitted a situation to exist in his office where he penciled—I refuse to give it the integrity of a return—penciled a 1040 form held together by a paper clip signed by Judge Claiborne as a result of receiving a phone call from the secretary in Watson's office. The entire return, the evidence showed, was prepared without Harry Claiborne's input as far as treatment was concerned.

There were discussions about the law practice, there were discussions about the sale of his home, and information was provided to the tax preparer. But the ultimate determination was made by Watson's office and the return reached the IRS in pencil form. Judge Claiborne was never contacted regarding it in order to see whether he could resolve the situation short of being indicted.

Judge Claiborne, when he thought there may have been something wrong with the return, he questioned Watson about it. After he received the refund he questioned Watson about it. Watson even had the audacity to tell Judge Claiborne that the return was OK, "Don't worry about it, Judge, because I checked it with two IRS agents."

It does not matter whether it is true or not, but that is what Watson told Judge Claiborne.

Judge Claiborne once again has a contraindication of willfulness, of fraud.

Judge Claiborne took that check and I tell you, if you are trying to cheat your Government you do not take an IRS check to a casino and cash it. But Judge Claiborne took that check to the casino and cashed it. No crime. But to suggest that it is a badge of fraud, a badge of willfulness, I submit once again does not make sense under the circumstances and what existed at the time as far as Judge Claiborne's mental frame of mind was concerned.

One other thing that I think is crucial when we are looking at willfulness and frame of mind is 1 month from the time this return was signed, the 1980 return was signed, by Judge Claiborne under the prosecution theory that he did not tell Watson about the $88,500, 1 month from that point in time Judge Claiborne filed with the Judicial Ethics Committee a financial disclosure statement.

That financial disclosure statement declared an amount from fees from private practice during the year 1980 of $88,500. Now there is a principle in law that the right hand is supposed to know what the left hand is doing. To suggest that Judge Claiborne was trying to commit some kind of deceitful act with the IRS, a part of the United States of America, and to tell the truth to the Judicial Ethics Committee, a part of the United States of America, once again, makes no sense. It is that type of context that we have to ask ourselves, was Judge Claiborne willful or was he careless? I submit you have to find at the worst that he was careless.

Now, we then get to Article IV, because I submit that based on the record that is before us, he did not receive a trial worthy of consideration as receiving some type of summary judgment of collateral adoption under Article III of the Articles of Impeachment.

As to count 4, has Harry Claiborne brought discredit upon the judiciary? I think the historical background as indicated by the House managers, which forms the precedents for an allegation such as article IV, is really found within the context of the Ritter impeachment back in 1935. We have to be careful when we analyze precedent in impeachment proceedings. Judge Ritter was charged with seven Articles of Impeachment. Six articles were substantive-type offense which related to the judicial function. Even Article IV, which was cast on a concept that he was guilty of income tax fraud, related to article I in the Ritter Articles of Impeachment. There appeared in a document showing where he appointed one of his friends, a sum of money which was not there in his tax return. So all of the articles related to the judicial function. So historically, the Articles of Impeachment under which a Federal judge has been charged have related to the judicial function.

In my research, this is the only instance in the history of this Republic that an individual has been charged with a situation outside of his judicial function, because nothing that is being charged against Judge Claiborne reflects on his judicial performance or on the way he dispensed his judicial obligation. In Judge Ritter's situation, he was found guilty of the seventh article, which was a catchall, but the catchall directed itself to the activities which related to the judicial function. In this particular situation, we do not have that.

The fourth article under which Judge Claiborne is charged in the Articles of Impeachment does not go to a violation of his judicial function or misconduct as far as being a judge. It is a general article and it talks in terms of its bringing discredit to the judiciary.

I submit this to you: Every once in a while, in a perfect society, and our society is about as perfect or as close to perfect as you can become, there is an aberration. I submit that based on all of the circumstances surrounding the prosecution of Judge Claiborne, this was an aberration. But the one thing that Judge Claiborne can stand proud about is that the record as it exists before the committee pursuant to rule XI suggests that his judicial function was performed with integrity, was performed with scholarship, was performed with dedication, and he was the valued public servant that one seeks to have serving in the judiciary in the American public.

I submit that instead of being looked at with scorn and ignominy as a result of his contesting the impeachment proceeding, instead of throwing up his hands and saying, "I quit, I resign," I think the fact that he has gone through this because he believes in his innocence, that he has gone through this to carve out an example with the American public that our system of separation of powers does work, that it is vitally important that the integrity and the independence of the Federal judiciary remain intact and not be chilled as a result of the acts of another branch of government—that he does all of this at his own personal physical and mental and emotional expense, that he undergoes this traumatic experience for the purpose of accomplishing something as an American citizen, should not bring him into a context of causing discredit to the judiciary. Rather, it should cast him in the mold of an individual who is carrying through to the very end what he believes in and what he has dedicated his life to as a public servant serving the people of Nevada, both as a practitioner, a lawyer, and as a judge.

I submit to you that the proper determination under the circumstances that have been brought to you would be to bring these witnesses forward and to evaluate after you saw them whether or not, within the context of the hatred and the vendetta and the bitterness and the acrimony that existed at the time that Judge Claiborne is charged with committing willful violations, whether anybody would have engaged in such activity under those circumstances.

I submit to you that if in fact you make that reserved judgment, you will conclude that you must find in performing your autonomous function that Judge Claiborne, as a member of an equal branch of government and entitled to that respect as an Article III judge, should be acquitted and found not guilty of the four Articles of Impeachment.

RECESS FOR 15 MINUTES

The **President** pro tempore. The distinguished Senator from Maryland.

Mr. **Mathias**. Mr. President, I suggest and ask unanimous consent that the Senate may take a 15-minute recess at this point.

The **President** pro tempore. Without objection, it is so ordered. The Senate will take a 15-minute recess.

[Thereupon, at 4:28 p.m., the Senate recessed for 15 minutes; whereupon, at 4:53 p.m. the Senate reconvened when called to order by the Vice President.]

The **Vice President**. The Senate will be in order.

Senators are asked to take their seats.

The majority leader is recognized.

Mr. **Dole**. Mr. President, I am permitted to make an announcement?

The **Vice President**. Without objection, the majority leader.

ANNOUNCEMENT

Mr. **Dole**. Mr. President, let me announce that between the hours of 6 and 7 in room S-230 we will have guests of myself, the distinguished minority leader, Senators Lugar, Pell, and Metzenbaum, Mr. and Mrs. Orlov and Mr. and Mrs. Daniloff.

The **Vice President**. Counsel may proceed.

Mr. **Goodman**. Mr. President, with your permission may Judge Claiborne address the honorable body?

The **Vice President**. He has that right.

Mr. **Goodman**. May I also raise the question of a quorum being present?

The **Vice President**. Under the order the Chair is prepared to count for a quorum.

Senators are asked to take their seats so the quorum count may be concluded.

A quorum is present.

Mr. Claiborne.

Judge **Claiborne**. Mr. President, the distinguished Members of the Senate, distinguished Members of the House, and my attorney:

I don't think I will take as long as the other people that have addressed you because I have a very sore throat. But I did want to talk to you primarily I think to let you see me. I kind of feel like a piece of meat that is thrown out to a couple of dogs, jerking back and forth for possession, between the engagement between the House managers and my lawyers.

I have been called a liar three times in my life, once in Reno, NV, in my second trial by a member of the Justice Department, one of my prosecutors, and once here today by Mr. Fish and once by Mr. Rodino.

I find those charges, to say the least, unsettling. But on reflection, I think, considering the number of trials that I have been in in my lifetime, that maybe it is a compliment after all that I am only called a liar three times in my adult life.

You were told that we would make some wild charges about vendettas. In fact, Mr. Rodino asked you to listen carefully to what we say in that regard. He said something about the old adage of if you didn't have the facts, you would argue the law, and if you didn't have the law with you, argue the facts. And he indicated that our charges of a vendetta were somewhat less than realistic and maybe that we were paranoid. Nothing could be further from the truth.

I want to be honest with every Member of this body. I would much rather right today be almost any place than here. But I knew when I was convicted that this was the place that I had to come.

And I have felt that I was not dealt fairly with on the trial level, in that on the trial level, they refused to hear my pleas, if you please, of Government misconduct against me. And the appellate court turned a deaf ear also.

And I knew that I had to go somewhere. I knew there would be somewhere, somebody that would listen. And I told my lawyers and I told everyone that was concerned with my personal life that somewhere along the line, some judge is going to say, "Wait a minute. Wait a minute. What in the world went on? What happened?" And when the time comes that that judge will say that, I would receive some relief.

I am not fighting here for a judgeship. That may forever be gone. I am not fighting for my freedom, because I have given up a large part of that, and I know I will give up some more before I am released.

There is more involved than Judge Harry Claiborne of the District Court of Nevada. And what is involved is a spirit of fair play. What is involved is honesty and decency and what is involved is the independence of the American judiciary.

I won't bore you with long tales of how I suffered or what Government has done to me, but I will tell you this: that I have served the judiciary well, that I have been energetic in the pursuits of my duty, that I have been loyal to my oath, and no Federal judge in America has worked any harder or produced any more in the period of time that I was on the Federal bench.

And the only reason that I could not give more to the duties of my office would have been the confines of my intellect and my ability, because I gave that job all of my very being, both physically and intellectually.

When I went away to prison, the day before, I journeyed to San Francisco because I felt obligated that I should go and talk to Judge Browning, my boss, the chief judge of the ninth circuit. And I went to say goodbye to him and to thank him for all of the encouragement that he extended me during the period of time that I was on the bench. And he walked out to the door with me, and he said: "I want you to remember this because the way may be hard for you in the future and this may be something that you need to fall back on some day." And he said, "You must keep constantly in your mind that you were not just a good judge, but you were a fine judge and that nobody in this country will be able to take that away from you."

And I have no special message here today to you. The only thing that I can say to you is that I have been, I think, a fine judge. And I have brought to the bench, I thought, a sense of fairness that was unusual in the judicial system.

One of the brightest things of all the hearings and trials that I have been through, one of the most pleasant things that has happened to me was in the impeachment hearings before the committee of 12, and the fine U.S. attorneys that had practiced before me, one by one came to give character evidence of the fact that I was a good judge. And the thing that I was most happy to hear was the fact that they said, "He was fair."

And that is what I went to the bench to do, and that is what I did. I ran a fair court. I ran a court that was cordial and pleasant to counsel. I ran a court that was cordial and pleasant to the litigants. And I ran a court that every human being that walked in, their case would be heard fairly and everybody given a just and fair hearing.

I recognized when I went on the bench that it was difficult for the average citizen to take on what we call in the vernacular city hall. And did you ever happen to think what a burden it is to the private citizen who must fight an agency of the Federal Government? The average citizen who fights an agency of the Federal Government ordinarily cannot go out and hire the best lawyer there is because they are limited by finances.

They can't go out because of the same limited finances and hire experts but a Government agency can bring in the finest talents in the world and bid against them. The Federal agency has an unlimited amount of funds to pour into the trial, and to bring experts from all over the world. Not one, but dozens of them who will testify to every scientific fact known to the case. And there is the little common citizen who has almost an impossible burden when he attempts to win or he attempts to litigate against the Federal Government or any agency of it.

If, in the future, they ever write down anything that I ever did in my whole life, they will be able to say that Harry Claiborne had a court where the little citizen received fair and just treatment from the bench. And I am prouder of that than I am in the accomplishment that I may have had on the Federal bench

I am not here by choice. As I said to the committee of 12 when we were appearing before them in my testimony, I have had nearly all the people that love me, and fortunately for me, there are more of them than I ever dreamed—have begged me not to do the thing that I am doing this very moment, to just resign, walk away, do my time, get back to my people, pick up the pieces from my shattered life, and start rebuilding something of the future. But I could not do it. I could not do it, and I appreciated the love and concern they all had for me.

I know that they all had my best interests and my welfare at heart. But I could not walk away. I could not walk away because I have not violated a single law of the United States. I have not defrauded my Government. I have heard the word corrupt used in these arguments by the House Members today. I have not been corrupt in my office. And as long as that is so, I could not walk away and leave any impression that I may be guilty of something that I did not do.

So I chose to fight. And I will fight here, and if I lose here I will continue to fight. And I will continue to fight until my good name is cleared, and until somewhere along the line someone will listen and find out that once and for all what has happened to me, and what has happened to my life.

I owe that to countless other Federal judges now sitting on the bench. I owe that to the citizens of this country. And I owe that, as I said before, to my grandchildren because that is the only legacy I will be able to leave, is the legacy of courage, because I have been stripped of everything else.

But I can do that because other Federal judges are going to follow me. Believe me. Other Federal judges will follow me. They will follow me next year and they will follow me the year after. And some Federal judges will be here for the same reasons that I am here, because it has started now and no longer, no longer do the young Turks in the Justice Department respect the judiciary to the point that they will say, hey, listen, we think that this is wrong, and talk to you about it, and reason with you about it. They don't want that because there is a certain inclination in Justice today to become headhunters, to try and prosecute those individuals that will give them the most publicity—those that can attract the most attention, I say and I predict that I will not be the last Federal judge before this very body or the new body of next year. I will not be the last.

I did nothing, I don't think, that the average American citizen does. I think when the American citizen, the average American citizen goes to a tax preparer or an accountant, and he furnishes him all of the information and especially if he uses a long form 1040, and then he gets his return, that he casually looks it over. He is concerned first with "What do I owe," and when he is told what he owes he pulls out his checkbook, he writes the check, and he mails it to the Internal Revenue Service. I do not think the average citizen goes home and makes a personal audit of the account's return, or check it minutely to see that every entry in it is correct. I think that he goes to the individuals in whom he has special trust, and when he gives him the information pertaining to his taxes, he rests upon the trust of the individual that does his return. And when he finds out what he owes, he pays it, and he goes his way.

And I don't think the average citizen has an occasion to return to look at his 1040 unless something untoward occurs. And he must go once again and review it.

I am no different than anybody else. I hired a man that I thought was capable. I gave him all of the information pertaining to my income that I had. And all that existed. And they prepared my return, and as I said before, they made mistakes. They made mistakes in my return. If I had been the average citizen, and if it hadn't been that I had made certain people a little angry at me along the way, if I had kept my mouth shut, and I had not said some things about the strike that I said, then in all probability nothing would ever have occurred with reference to my return except a simple audit. But no audit was ever made of my return.

The first thing I know is I am being audited by the grand jury. My taxes have been submitted to the grand jury. And in Reno, NV, in the summer of 1983, before I was indicted in December 1983, what occurred before that investigations of me by a grand jury, in Las Vegas, NV, in the year 1980 wherein that the Government was investigating me for wiretapping while I was a lawyer, a private lawyer, where they were accusing me with some private detective of bugging someone's home. And that grand jury investigation went on for a number of months. And there wasn't one iota of evidence ever presented to that grand jury that I had ever in my entire life bugged anyone's house or ever hired anybody to do it or ever asked anybody to do it.

And then all of a sudden they go into Brazil, and they inquire of one Joseph Conforte, and as Mr. Goodman told you, they gave him a tax break for life by reducing his taxes some millions of dollars, wiping out all of his criminal slate for 15 months, and they brought him here and they began to investigate me then for bribery. And they tried me for two counts of bribery. They couldn't make a case against me then either. They charged me and tried me for fraud, wire fraud by telephone, and nobody to this day has been able to figure out what that charge was about.

They offered little or no evidence of that.

They charged me with obstruction of justice. They tried to get a lawyer to testify falsely before the grand jury. Those charges, some seven of them, went before the court and the jury was out some 8 days and could not agree. But they did hold 10 for acquittal and 2 for conviction.

Then the Government decided to try me on the tax case, and they did, and they convicted me on the 1979 return and on the 1980 return.

This is plainly a matter, in my opinion, that they did not believe my secretary. In 1979 I had sent a document to my accountant and in this document, a letter that I had written to him, I gave him the exact amount of fees that I had collected. I attached to the letter my W-2. I attached to it a check for $8,000 that he asked for. I sent my secretary to his office.

In the course of the trial, he first admitted that he received the letter and that he treated it in some manner.

Then there was a recess and he went out into the hall and after conversations with government counsel he came back and on reexamination he testified, "No, I was wrong when I said that I received the letter and that I considered it. I have never seen this letter until Mr. Goodman brought it to me and showed it to me."

The jury must have believed my secretary who said she took the letter to his office or believed Mr. Wright. Apparently, they chose to believe Mr. Wright. If they believed my secretary, then they believed that I was telling the truth also. If they didn't believe her, then they didn't.

Then they didn't believe me.

It was not known at that time, as Mr. Goodman carefully explained to you today, that my secretary had given this letter to a different lady than she though she had given it to. This lady happened to be the office manager of Mr. Wright. She did not appear but she saw the impeachment proceedings and she gave an affidavit, which was received in evidence; she said she did in fact receive the letter from my secretary, she did in fact put it on Mr. Wright's desk, and Mr. Wright did, in fact, use it, and Mr. Wright came to her a few days after and said they had lost the letter and wanted to go through all of her files looking for it.

We did not have the benefit of that at the trial. If we had had the benefit of it at the trial in all probability I may not have been here.

But one thing that I do know, that I truthfully gave my accountant all the information pertaining to every quarter of my income in both the years 1979 and 1980. I argued for Watson in good faith. I went into his office. I talked to him. He told me he had one CPA working for him and that she would do the work on my tax return. He said he would review it. While I was there, the record shows, and I have testified to this before, I heard him answer some tax problems of a client on the telephone. I was impressed by the manner in which he answered the questions. He was forthright in his answers. He answered them deliberately. He impressed me as being a man who knew what he was doing.

He told me while I was there that he did tax planning and estate planning, and I believed him.

I heard a short time afterwards that a number of doctors were clients of his, and I believed that he was qualified. I trusted him. I gave him every bit of the information that I had, every bit of the information pertaining to all of my income, all of my deductions, all of my bills and he prepared my return. He turned it over to a lady who went so far with it and could not go any further and presented the matter to him. Then he gave it to another lady and she brought it back. I went in and signed the return. I went in and signed the return during the lunch hour and went back to my quarters. A few days later he gave me the bill for his services.

The Vice President. The Chair must state that under the order of the Senate the remaining time belongs to the managers for the House to close the argument.

Mr. Mathias. Mr. President, I ask unanimous consent that the respondent have 5 minutes in which to complete his statement.

The Vice President. Without objection, it is so ordered.

Mr. Claiborne. They have all maintained that I am a good judge, that I was a good lawyer, that I was a professional, and that I should have known that my return was incorrect.

Mind you, the only thing the Government was charging me with on the 1980 return is that I did not declare fees that I collected in the amount of $88,500.

Mr. Watson's office had treated the $88,500 on a schedule D, which my accountant when he performed my audit after I was indicted said he can't do that. We conceded that he did it incorrectly. But I did not catch that it was done incorrectly. He told me that it was correct.

When it began to look like I was going to be indicted, I talked to him. I said, "I want to know how you did it. I want to know exactly what you did."

He told me then that he had taken business losses, that he had deducted the amount that I had received in collections from fees, past fees, deducted that from the amount of my business losses, and he had treated it on a schedule D. I said, "Can you support that?"

He said, "Yes." Then he said, "Judge, I have taken your return to two IRS agents, both of whom I trust and have great confidence in their ability. Both of them have told me, and one of them does nothing but audits of over $1 million involved, and they both have told me that your tax return was done correctly." That reassured me. That reassured me.

That was the sole government contention everywhere but here. Since we got here, an expert testified that there were other errors in that nobody had caught. Four experts testified for the government in the two trials. My CPA testified on his audit. It had been gone over time and time and time again by experts in the IRS and nobody, of all of those qualified people, had ever picked up there was an additional error of some importance in my return.

I ask you this question, am I under any different standards for me that if the experts for the IRS, if the experts for the Federal Government, and if the CPA experts that I have hired do not catch an obvious mistake in a return that I should have the audit, or that I should have caught the matter in schedule D?

Of course not.

They say that it is not realistic, that I claimed to be too busy, that I had time for other things, I had time to buy houses, I had time to buy an apartment house, and I had time to shop for quarter horses in Mexico.

It isn't realistic that I did not have time.

I want to tell you right now that I had very little time for my personal business, very little time. And I am not alone. I don't think there is a Federal judge in America on the bench that has time for his personal business. I can honestly state that I believe this, that Federal judges of this Nation are killing themselves. You cannot imagine the long hours they are working. You cannot imagine the time they spend on the bench. During recess, they are dictating orders or signing orders or reading briefs or preparing opinions, sustaining opinions. Then they go back on the bench and try a case. They cut their lunch hours short, they stay at night or get into their offices sometimes as early as 6:30 in the a.m.

The VICE PRESIDENT. The additional time has expired. The remaining time is under the control of the managers of the House.

Mr. Manager RODINO. Mr. President, I seek recognition.

The VICE PRESIDENT. Mr. Rodino is recognized.

Mr. Manager RODINO. Mr. President, the managers on the part of the House respectfully submit that they have summed up the evidence and the facts that are contained in the post-trial brief and, rather than belabor and rebut this record, we respectfully recommend to your attention that House brief which carefully, accurately, and truthfully reviews the evidence and presents the law.

Thank you.

Mr. DOLE. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The VICE PRESIDENT. Without objection, it is so ordered.

The majority leader is recognized.

CLOSED SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate now go into closed session.

The VICE PRESIDENT. Without objection, it is so ordered. The Senate will go into closed session.

Whereupon, at 5:36 p.m., the Senate proceeded into closed session.

OPEN SESSION

[Thereupon, at 6:28 p.m. the Senate continued in open session.]

Mr. Humphrey addressed the Chair.

The VICE PRESIDENT. The majority leader is recognized.

Mr. **Humphrey**. I ask unanimous consent that I might proceed for 30 seconds.

The **Vice President**. Is there objection?

Mr. **Dole**. Are we not in open session?

The **Vice President**. The Senate is now in open session.

Mr. **Humphrey**. Mr. President, I ask unanimous consent that I might proceed for 30 seconds.

The **Vice President**. Without objection, the Senator from New Hampshire is recognized for 30 seconds.

Mr. **Gore**. Mr. President, reserving the right to object, parliamentary inquiry.

The **Vice President**. The Senator will state the parliamentary inquiry.

Mr. **Gore**. Mr. President, if we go back into open session, are we then governed by the rules that preclude any Senator from speaking? Are we automatically back on the impeachment?

The **Vice President**. The Senate is automatically back on impeachment. That is correct.

The Senator from New Hampshire under a unanimous-consent request has asked for 30 seconds. Is there objection?

Without objection, the Senator will proceed.

Mr. **Humphrey**. I thank the Chair.

Mr. President, sometime soon, I take it, we are going to vote on the motion on the part of Judge Claiborne that we designate beyond a reasonable doubt as the standard of proof. Some of us are not lawyers. Absent a ruling, what is the standard? We have scarcely debated what the standard will be and we are about to vote on this motion. I would like to know what standard we are going to adopt if we rule against Judge Claiborne's motion.

Mr. **Long** addressed the Chair.

The **Vice President**. The Senator from Louisiana.

Mr. **Long**. Mr. President, I ask unanimous consent to proceed for 1 minute.

Mr. **Mathias**. Is the Senator addressing himself to the impeachment proceedings?

Mr. **Long**. To the motion.

Mr. **Mathias**. Will the Senator withhold for a minute?

Mr. **Long**. I only asked for 1 minute.

Mr. **Mathias**. I raise the objection to proceeding in open session without the presence of the parties.

The **Presiding Officer**. Objection has been heard.

Mr. **Gore**. A parliamentary inquiry, Mr. President.

Mr. **Dole**. Mr. President, I suggest the absence of a quorum.

The **Presiding Officer**. The clerk will call the role.

The assistant legislative clerk proceeded to call the roll.

Mr. **Dole**. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The **Presiding Officer** (Mr. **Boschwitz**). Without objection it is so ordered.

Mr. **Dole**. Mr. President, I renew my request that the Chair rule on the third motion, the one that has been restated in closed session. I ask that it be restated in public session.

The **Presiding Officer**. The clerk will read.

Mr. **Heflin**. Mr. President, a parliamentary inquiry.

The **Presiding Officer**. Debate is not in order in open session.

Mr. **Heflin**. I have a parliamentary inquiry.

By declining to adopt the reasonable doubt as a standard of truth, does that prevent individual Senators from adopting their own, individual standard of proof, which might be clear and convincing, preponderance, or a reasonable doubt?

As I gather, Senator Sarbanes suggested that the matter was a reasonable doubt or whatever standard a Senator wanted to use himself. So my parliamentary inquiry is, if we were to reject this, does this prevent a Senator from using, in his own mind, a reasonable doubt standard?

The **Presiding Officer**. The Chair cannot impose any standard upon any Senator, so that a Senator could impose upon himself reasonable doubt as a standard.

Mr. **Dole**. Mr. President, I renew my request.

The **Presiding Officer**. The clerk will read.

The assistant legislative clerk read as follows:

> Motion to designate "beyond a reasonable doubt" as the standard of proof in the impeachment trial.
>
> The Respondent, Judge Harry E. Claiborne, through his counsel, Oscar B. Goodman, Esq. and, the Honorable Howard W. Cannon, respectfully moves the Senate to designate "Beyond a Reasonable Doubt" as the standard of proof in the impeachment trial of said Respondent. The grounds in support of this Motion are set forth in the Memorandum attached hereto and incorporated herein by reference.

Mr. **Metzenbaum**. Mr. President, a parliamentary inquiry.

Mr. **Dole**. A parliamentary inquiry is not in order.

Mr. **Metzenbaum**. They just accepted one.

The **Presiding Officer**. Debate is not in order.

Mr. **Metzenbaum**. I am not asking for debate. I am merely asking a parliamentary inquiry: whether or not by turning down the motion, there is any inference left that the standard of reasonable doubt shall not be applicable.

The **Presiding Officer**. The Chair has not denied the motion. The Chair cannot establish any type of standard to each Senator.

Mr. **Metzenbaum**. If the Senate as a body turns down the motion, is there an inference left that would be applicable?

The **Presiding Officer**. The inference that would then be left is that each Senator will make his own determination of what standard of evidence he applies to the decision.

Mr. **Metzenbaum**. I thank the Chair.

The **Presiding Officer**. Judge Claiborne has moved that the Senate establish a standard of evidence at the impeachment trial to be proof beyond a reasonable doubt. The Presiding Officer, under the Senate impeachment rule VII, is empowered to determine all forms of proceedings not otherwise provided for.

It is the Chair's determination that the question of standard of evidence is for each Senator to decide individually when voting on Articles of Impeachment.

Mr. **Hatch**. Mr. President, a parliamentary inquiry.

The **Presiding Officer**. The Senator will state it.

Mr. **Hatch**. As I understand it, the Chair has decided that the standard to be adopted in this manner will be that which is in the heart of each Senator. Is that correct?

The **Presiding Officer**. That is correct.

Mr. HATCH. If we wanted to have a standard of reasonable doubt, would we have to appeal the ruling of the Chair?

The PRESIDING OFFICER. The Senator would have to ask that the motion of Judge Claiborne be submitted to the Senate.

Mr. HATCH. Then, I so ask, and I ask for the yeas and nays.

The PRESIDING OFFICER. The Senator has that right.

Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. HATCH. Mr. President, a parliamentary inquiry.

Mr. DOLE. No debate.

Mr. HATCH. Is there no debate on whether we should have the standard set?

The PRESIDING OFFICER. No debate is in order. That is correct.

Mr. SIMON. Mr. President, I ask unanimous consent that each side may have 2 minutes to discuss this briefly, because I think we are talking about something extremely important.

Mr. HATCH. I join in that unanimous-consent request.

Mr. MATHIAS. Mr. President, reserving the right to object——

The PRESIDING OFFICER. The Chair will say, and is advised by the Parliamentarian, that debate in open session is specifically prohibited.

Mr. DOLE. I object.

Mr. STEVENS. Regular order.

The PRESIDING OFFICER. Objection is heard.

The yeas and nays have been ordered, and the clerk will call the roll.

Mr. ARMSTRONG. Will the Chair state the question?

The PRESIDING OFFICER. The question is whether or not the motion of the respondent is well taken.

The clerk will call the roll.

Mr. HATCH. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Utah will state it.

Mr. HATCH. If a Senator votes "yes" or "aye," what will he or she be voting for?

The PRESIDING OFFICER. In the event a Senator votes "aye," he will be in support of the motion, and the motion is to establish the "beyond a reasonable doubt" test.

The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. EXON. May we have order in the Senate.

The PRESIDING OFFICER (Mr. Humphrey). The clerk will suspend.

The Senate will come to order. Could we have order?

The clerk will resume.

The legislative clerk resumed and concluded the call of the roll.

Mr. SIMPSON. I announce that the Senator from North Dakota [Mr. Andrews], the Senator from Alabama [Mr. Denton], the Senator from Utah [Mr. Garn], the Senator from Florida [Mrs. Hawkins], the Senator from Pennsylvania [Mr. Specter], the Senator from Idaho [Mr. Symms], and the Senator from Connecticut [Mr. Weicker] are necessarily absent.

Mr. CRANSTON. I announce that the Senator from Mississippi [Mr. Stennis] is necessarily absent.

The Presiding Officer. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 17, nays 75, as follows:

[Rollcall Vote No. 333]

(Motion To Designate "Beyond a Reasonable Doubt" as the Standard of Proof in the Impeachment Trial—Court of Impeachment—Judge H.E. Claiborne)

YEAS—17

Burdick
Evans
Goldwater
Hart
Hatch
Hatfield
Helms
Johnston
Laxalt
Long
Matsunaga
Metzenbaum
Pell
Pryor
Riegle
Simon
Warner

NAYS—75

Abdnor
Armstrong
Baucus
Bentsen
Biden
Bingaman
Boren
Boschwitz
Bradley
Broyhill
Bumpers
Byrd
Chafee
Chiles
Cochran
Cohen
Cranston
D'Amato
Danforth
DeConcini
Dixon
Dodd
Dole
Domenici
Durenberger
Eagleton
Exon
Ford
Glenn
Gore
Gorton
Gramm
Grassley
Harkin
Hecht
Heflin
Heinz
Hollings
Humphrey
Inouye
Kassebaum
Kasten
Kennedy
Kerry
Lautenberg
Leahy
Levin
Lugar
Mathias
Mattingly
McClure
McConnell
Melcher
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pressler
Proxmire
Quayle
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Simpson
Stafford
Stevens
Thurmond
Trible
Wallop
Wilson
Zorinsky

NOT VOTING—8

Andrews
Denton
Garn
Hawkins
Specter
Stennis
Symms
Weicker

So the motion was denied.

Mr. Byrd. Mr. President, I move to reconsider the vote by which the motion was denied.

Mr. Mathias. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. Dole addressed the Chair.

The Presiding Officer. The majority leader.

Could we have order?

The majority leader.

Mr. Dole. Mr. President, as I understand, a parliamentary inquiry is not in order, is that correct?

The Presiding Officer. Debate is not in order.

Mr. Dole. Mr. President, I ask unanimous consent that I may proceed for 2 minutes.

The Presiding Officer. Without objection, it is so ordered.

Mr. Dole. Mr. President, I would just say to my colleagues, I have been advised by the Chair now that if we adjourn as a court of impeachment and go into legislative session and take care of a pile of work that we have, then the remaining motion would fall because, by unanimous consent obtained last evening, at 9:30 a.m. on Wednesday, October 6, we would deliberate the Articles of Impeachment. There is no time limit on how long the deliberations would take, but they would start at 9:30 tomorrow and the remaining motion would disappear.

I am going to suggest that we modify the unanimous-consent order so that at 9:30, we discuss not only the Articles of Impeachment but the remaining motion, because I think that is very important. And I think the managers, those who were on the committee of 12, and all other Senators, would agree that we should not let it disappear because of some unanimous-consent agreement.

But I am wondering if we might also add to that unanimous consent tomorrow morning that we would complete our discussions at 11:30 a.m. That would be 2 hours of debate in closed session starting at 9:30, and then proceeding until about 1:30. Does anybody object to that? Would that be adequate time? The reason I ask that is, I have been asked by a number of Members who are in very important conferences, and they want to be here. They want to be there. They have been here most of the day, I think rightfully so. Would anybody object to that agreement?

Mr. Pryor. Reserving the right to object, Mr. President, if the majority leader would answer this question: Is there a reason why, during that period of time, the session would be closed rather than open session?

Mr. Dole. It is the rule. I understand it is the rule.

Mr. Byrd. Mr. President, would the distinguished majority leader yield?

Mr. Dole. I am happy to yield.

Mr. Byrd. Mr. President, the rules of impeachment require the Senate be in executive session when they are in deliberation in relation to an impeachment. By unanimous consent, of course, the rules can be set aside. That is why we have not been able to debate while the Senate has been in open session. It is what the rules require. I think it is good that we have this debate in closed session with respect to certainly this next motion. I hope that the request would be granted because I think this next motion, as far as I am concerned looking at the long-term future and with great regard for the precedents of the Senate, is extremely important. I would like to have that motion debated, and decided.

Mr. Stevens. Mr. President, will the Senator yield?

Mr. Dole. Yes.

Mr. Stevens. What would be the impact of the majority leader's request after 2 hours of debate? Would we then go to a vote?

Mr. Dole. Then we would proceed to dispose of the motion. At that time, if we had disposed of the motion, it would be my present intention then to suggest that we not vote on the articles until the following day. So the Members would have that additional time to review the evidence.

Mr. STEVENS. May I inquire, if I may? Would it be in order at that time at the expiration of the 24 hours for the motion to postpone to a day certain to be considered by the Senate?

The PRESIDING OFFICER. That would require unanimous consent.

Mr. STEVENS. May I make a parliamentary inquiry? In any part in the proceedings from here on, would it be in order for a Senator to make a motion to postpone the final disposition of this case to a day certain?

The PRESIDING OFFICER. Such a motion would not be in order. The Senate can do it only by unanimous consent.

Mr. STEVENS. Is there a limitation on debate, Mr. President?

The PRESIDING OFFICER. There is a unanimous-consent order that the Senate proceed to vote following tomorrow's closed session.

Mr. DOLE. Mr. President, I yield to the Senator from Idaho.

Mr. MCCLURE. If I understand correctly, the request would require that we come in at 9:30 tomorrow, the motion would be pending, there would be a period of time for debate, and then we would vote on the motion. So the debate tomorrow morning would be with respect to the motion. Is that correct?

Mr. DOLE. It would be in respect to the motion, and we would also deliberate on the Articles of Impeachment. The order now provides that at 9:30, we debate on the Articles of Impeachment. There is no time limit. It does not say at 1:30 you stop. It just says we start at 9:30. I am seeking to amend that order by including the remaining motion as well as the Articles of Impeachment be deliberated upon commencing at 9:30 and ending at 11:30 a.m.

Mr. MCCLURE. Would the Senator yield further?

Mr. DOLE. Yes.

Mr. MCCLURE. Whatever of that time would be taken with respect to the motions, we would vote no later than 11:30 with respect to the motions?

Mr. DOLE. Unless there was an agreement to extend the time.

Mr. MCCLURE. If there were anytime available between 9:30 and 11:30 for debate upon the articles themselves, that would depend upon the flow of the debate and the disposition of the motions?

Mr. DOLE. That is correct.

Mr. METZENBAUM. Reserving the right to object, I want to say very reluctantly, I will object. I am concerned about this procedure. I know the leader has the responsibility to keep this body moving. We are also dealing with an extremely important matter. I don't have to reemphasize that. As I understand it, if we accept the leader's unanimous-consent request, there will be 2 hours, within which time we will be expected to debate the pending motion, and we also would have expected to debate the issue as it pertains to the articles themselves as to whether there is a finding of guilty or not guilty. Frankly, I strongly feel that I want to hear more from David Pryor, Al Gore, Orrin Hatch, and some of the others who are on this committee.

I would hope that the Senate would have an opportunity not alone to have heard the arguments made very eloquently by the House and the defense, but I hope some of the Members of this body could be heard because I think there is still a considerable amount of confusion that exists. Many of us are not certain just what is the right decision to make.

I do not want to be the person who throws the monkey wrench into the procedure. But I do feel very strongly that the Senate is entitled and should have more than 2 hours to debate the motion as well as the articles.

As to the motion, I have no problem for 2 hours. But as to the question of guilt or nonguilt, I am concerned there will be no time left for that debate. I think there ought to be. I respectfully submit to the leader that at least we ought to have 4 hours before we actually are called upon to vote as to whether this man is guilty or not guilty.

Mr. DOLE. Mr. President, if I may proceed to make unanimous consent for additional 2 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOLE. Mr. President, one way to resolve the problem would be to have the debate tomorrow morning for 2 hours just on the motion and then agree to dispose of the motion; then include in that request that at 9:30 a.m. on Thursday morning, there will be another 24-hour period where we could have time to take a look at the record. We would then have 2 additional hours of debate on the Articles of Impeachment. Following that debate, then we would vote on the articles.

Mr. BYRD. Mr. President, the distinguished majority leader would be thinking in terms of, say, beginning on the votes at 2 o'clock in the afternoon.

Mr. DOLE. If we came in at 9:30, we would hopefully be on the vote at 11:30.

Mr. BYRD. On Thursday?

Mr. DOLE. Yes.

Mr. BYRD. I would hope for reasons which I will be happy to discuss with the distinguished majority leader that the votes not occur until in the afternoon at 2 o'clock or thereafter.

Mr. DOLE. We complete our debate at 11:30.

Mr. BYRD. That would be all right.

Mr. STEVENS. Is that a unanimous-consent request?

Mr. DOLE. I am just suggesting. Everybody wants to put it together here and somebody has to. We are either going to do something or we are going to move on to something else.

Mr. STEVENS. Would the majority leader include in that some concept that we could have determination of the wish of some Members that we postpone the matter until a day certain?

Mr. DOLE. We are going to postpone it now until a day certain, Thursday.

Mr. STEVENS. I have in mind postponing it for the week we are back here in November.

Mr. BINGAMAN. Would the majority leader yield?

Mr. DOLE. I am happy to yield.

Mr. BINGAMAN. I just ask. It seems to me that the disposition of this motion tomorrow morning at 11:30, which is contemplated, will determine when the Senate should take additional action and what additional action the Senate should take. So that I certainly have no problem with the unanimous-consent request that contemplates 2 hours of discussion on the motion tomorrow and then a vote on it. But I am reluctant to go along with the unanimous consent that it would bind us for what happens after that in case the motion is granted and the Senate determines to call witnesses or something. We need a different schedule.

Mr. DOLE. Mr. President, I would agree with that. I would suggest that we modify the request that at 9:30 a.m. tomorrow until 11:30 a.m., we deliberate on the one motion that is still pending.

Mr. DOMENICI. Reserving the right to object, Mr. Majority Leader, what does that mean with reference to the already agreed-upon unanimous consent that would indicate we would vote immediately after? I believe that is the unanimous consent now. That would have to be vitiated, would it not?

Mr. DOLE. Mr. President, this would modify the unanimous-consent request. There is nothing in the current unanimous consent that would indicate when we would vote on the Articles of Impeachment. It just says we will commence that discussion tomorrow morning at 9:30. I am modifying that unanimous consent agreement, that at 9:30 tomorrow morning, we would debate for not to exceed 2 hours, until 11:30, the remaining motion. I will make that request.

The PRESIDING OFFICER. Is there objection?

Mr. STEVENS. Is that time controlled?

Mr. DOLE. It would be 1 hour on each side.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. STEVENS. Is there now, Mr. President, a time certain to vote on the Articles of Impeachment?

Mr. DOLE. No, and there never was.

Mr. BYRD. Mr. President, while the majority leader has the floor, I understood earlier that there might be another rollcall vote today.

Mr. DOLE. I understand that the request for a rollcall on the Eximbank has now been withdrawn. We need to do that. We have about 30 bills to do on the legislative wrap-up calendar.

LEGISLATIVE SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate now adjourn as a court of impeachment and return to legislative session.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

[Thereupon, at 7:40 p.m., the Senate adjourned as a court of impeachment, and resumed legislative session.]

[Congressional Record—October 8, 1986—S 15557]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

COURT OF IMPEACHMENT

The PRESIDING OFFICER. Under the previous order, the hour of 9:30 a.m. having arrived, the Senate will now proceed in closed session to consider the remaining motions of the respondent.

[At 9:38 a.m., the doors of the Chamber were closed. The proceedings of the Senate were held in closed session until 12:14 p.m., at which time the following occurred:]

OPEN SESSION

[At 12:14 p.m., the doors of the Chamber were opened, and the Senate resumed open session.]

[During the closed session there was a call of the roll, Quorum No. 15.]

The respondent and his counsel were seated at the table assigned to them in the well of the Senate to the left of the Chair.

The VICE PRESIDENT. The Senate will be in order.

The majority leader.

The Senate will please be in order.

The majority leader.

Mr. DOLE. Mr. President, I ask unanimous consent to proceed for 1 minute.

The VICE PRESIDENT. The quorum call is in process.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. DOLE. I renew my request.

The VICE PRESIDENT. Is there objection to the majority leader's request?

Mr. RIEGLE. We ask Members to take their seats so the majority leader can he heard.

The PRESIDING OFFICER. Without objection, the majority leader is recognized and the Senate will be in order.

Mr. DOLE. Mr. President, first I ask the motion be read.

The PRESIDING OFFICER. The clerk will read the motion.

The assistant legislative clerk read as follows:

> Motion by Mr. Dole that the Senate not hear additional witnesses in this case.

Mr. DOLE. Let me state just very briefly: It seems after all the debate we had in closed session—it was very good debate on all sides of the issue—that we have to determine whether or not we are going to have to reopen and have a trial or not have a trial.

The only way we can do that is vote on the motion whether to hear witnesses; that is the only purpose of the motion. And I wanted to have that explanation so the Members will be aware.

Mr. LEVIN. Mr. President, will the Senator yield for a question?

Mr. DOLE. Yes.

Mr. LEVIN. Does this mean any additional witnesses?

Mr. DOLE. That is right.

The PRESIDING OFFICER. The question is on the motion, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from North Dakota [Mr. Andrews], the Senator from Alabama [Mr. Denton], the Senator from Utah [Mr. Garn], the Senator from Florida [Mrs. Hawkins], the Senator from Pennsylvania [Mr. Heinz], the Senator from Idaho [Mr. Symms], and the Senator from Connecticut [Mr. Weicker] are necessarily absent.

I further announce that, if present and voting, the Senator from Pennsylvania [Mr. Heinz] would vote "no."

The Presiding Officer (Mr. Hecht). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 61, nays 32, as follows:

[Rollcall Vote No. 334]

(Dole motion that the Senate not hear witnesses—Court of Impeachment—Judge H.E. Claiborne)

YEAS—61

Abdnor
Armstrong
Bentsen
Biden
Boren
Boschwitz
Bradley
Broyhill
Bumpers
Byrd
Chafee
Cochran
Cohen
Danforth
Dixon
Dodd
Dole
Domenici
Durenberger
Eagleton
Ford
Goldwater
Gore
Gorton
Gramm
Grassley
Harkin
Hart
Hollings
Johnston
Kassebaum
Kasten
Kennedy
Kerry
Lautenberg
Leahy
Lugar
Mathias
Mattingly
McClure
McConnell
Mitchell
Nickles
Nunn
Pell
Pressler
Proxmire
Quayle
Roth
Rudman
Sarbanes
Simon
Simpson
Specter
Stafford
Stennis
Thurmond
Trible
Wallop
Wilson
Zorinsky

NAYS—32

Baucus
Bingaman
Burdick
Chiles
Cranston
D'Amato
DeConcini
Evans
Exon
Glenn
Hatch
Hatfield
Hecht
Heflin
Helms
Humphrey
Inouye
Laxalt
Levin
Long
Matsunaga
Melcher
Metzenbaum
Moynihan
Murkowski
Packwood
Pryor
Riegle
Rockefeller
Sasser
Stevens
Warner

NOT VOTING—7

Andrews
Denton
Garn
Hawkins
Heinz
Symms
Weicker

So the motion was agreed to.

Mr. Dole. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. Byrd. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

LEGISLATIVE SESSION

Mr. Dole. Mr. President, I ask unanimous consent that the Senate now return to legislative session.

The **Presiding Officer**. Without objection, it is so ordered.

Thereupon, at 12:39 p.m., the Senate resumed legislative session.

[Congressional Record—October 8, 1986—S 15653]

REPRESENTATION BY SENATE LEGAL COUNSEL

Mr. **Dole**. Mr. President, I send a resolution to the desk for myself and the distinguished minority leader and ask for its immediate consideration. It is a resolution relating to the authority of the Senate legal counsel to defend the Senate in a pending court action relating to the impeachment proceedings against Judge Claiborne.

The **Presiding Officer**. The resolution will be stated by title.

Mr. **Dole**. I ask unanimous consent that the clerk read the resolution.

The **Presiding Officer**. Without objection, it is so ordered.

The assistant legislative clerk read as follows:

> A Senate resolution (S. 501) directing the Senate legal counsel to represent the defendants in *Harry E. Claiborne* v. *United States Senate, et al.* (D.D.C.).
>
> Whereas, Judge Harry E. Claiborne, the respondent in an impeachment trial now pending in the Senate, has filed a civil action against the United States Senate; George Bush, President of the Senate; Strom Thurmond, President pro tempore; Robert Dole, Majority Leader; and Robert C. Byrd, Minority Leader, seeking an injunction against the Senate's deliberation and final action on the articles of impeachment;
>
> Whereas, pursuant to section 703(a) and 704(a) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a) (1982), the Senate may direct its Counsel to defend the Senate and its Members and officers in civil actions relating to their official responsibilities: Now, therefore, be it
>
> *Resolved,* That the Senate Legal Counsel is directed to represent the defendants in the case of *Harry E. Claiborne* v. *United States Senate, et al.,* C.A. No. 86-2780 (D.D.C.).

Mr. **Dole**. Mr. President, we have just learned that Judge Harry E. Claiborne, the respondent in the impeachment trial currently in progress in the Senate, has today filed a civil action in the U.S. District Court for the District of Columbia, seeking an immediate injunction against the Senate's completion of the impeachment trial. Judge Claiborne is asserting in court that the Senate's adoption of Senate Resolution 481, which authorized appointment of the Impeachment Trial Committee, pursuant to Senate Impeachment Rule XI, to hear testimony and certify an evidentiary record for the Senate's use in this proceeding, and the Senate's determination today not to hear witnesses in open Senate, violates the Constitution. Judge Claiborne has named the U.S. Senate; George Bush, President of the Senate; Strom Thurmond, President pro tempore; Robert C. Byrd, minority leader; and myself as defendants and is applying for an immediate temporary restraining order, enjoining the Senate from proceeding to deliberate and vote on the pending articles of impeachment.

This resolution would direct the Senate legal counsel to represent the defendants in this action to protect the Senate's sole power under the Constitution to try impeachments.

The **Presiding Officer**. Is there further debate on the resolution? If not, the question is on agreeing to the resolution.

The resolution (S. Res. 501) was agreed to. The preamble was agreed to.

The resolution with its preamble is as follows:

S. Res. 501

Whereas, Judge Harry E. Claiborne, the respondent in an impeachment trial now pending in the Senate, has filed a civil action against the United States Senate; George Bush, President of the Senate; Strom Thurmond, President pro tempore; Robert Dole, Majority Leader; and Robert C. Byrd, Minority Leader, seeking an injunction against the Senate's deliberation and final action on the articles of impeachment;

Whereas, pursuant to section 703(a) and 704(a) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a) (1982), the Senate may direct its Counsel to defend the Senate and its Members and officers in civil actions relating to their official responsibilities: Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent the defendants in the case of *Harry E. Claiborne* v. *United States Senate, et al.*, C.A. No. 86-2780 (D.D.C.).

Mr. DOLE. I move to reconsider the vote by which the resolution was agreed to.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

[S. Res. 501 follows:]

99TH CONGRESS
2D SESSION

S. RES. 501

Directing the Senate Legal Counsel to represent the defendants in Harry E. Claiborne v. United States Senate, et al. (D.D.C.)

IN THE SENATE OF THE UNITED STATES

OCTOBER 8 (legislative day, OCTOBER 6), 1986

Mr. DOLE (for himself and Mr. BYRD) submitted the following resolution; which was considered and agreed to

---

RESOLUTION

Directing the Senate Legal Counsel to represent the defendants in Harry E. Claiborne v. United States Senate, et al. (D.D.C.).

Whereas, Judge Harry E. Claiborne, the respondent in an impeachment trial now pending in the Senate, has filed a civil action against the United States Senate; George Bush, President of the Senate; Strom Thurmond, President pro tempore; Robert Dole, Majority Leader; and Robert C. Byrd, Minority Leader, seeking an injunction against the Senate's deliberation and final action on the articles of impeachment;

Whereas, pursuant to section 703(a) and 704(a) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a) (1982), the Senate may direct its Counsel to defend the

Senate and its Members and officers in civil actions relating to their official responsibilities: Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent the defendants in the case of Harry E. Claiborne v. United States Senate, et al., C.A. No. 86-2780 (D.D.C.).

○

Various briefs, legal memoranda and court orders filed in *Harry E. Claiborne* v. *United States Senate* follow.

This is not an inclusive collection of court documents, but rather a representative sample drawn from pleadings filed in the appeal to the United States Supreme Court.

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
HAND DELIVERED
OCT 9 1986
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HARRY E. CLAIBORNE,)
)
Applicant/Petitioner,)
)
vs.)
)
UNITED STATES SENATE and)
George Bush, its President,)
Strom Thurmond, President)
Pro Tempore, Robert Dole,)
Majority Leader, and Robert)
C. Byrd, Minority Leader,)
)
Respondents.)

NO. ____________

EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PENDING APPEAL

Applicant herein the Honorable Harry E. Claiborne. United States District Judge for the District of Nevada, hereby applies to the Court for a temporary restraining order and preliminary injunction, during the pendency of an appeal before the United States Court of Appeals for the District of Columbia Circuit. that the respondents, their agents, servants employees attorneys and all other persons in active concert or participation with them be restrained and enjoined from any further proceedings in the Impeachment Trial of Applicant until such time as his rights can be determined under the Complaint for Declaratory and Injunctive Relief filed on October 8, 1986 in the United States District Court for the District of Columbia, on the grounds that, otherwise, Applicant will suffer irreparable harm and damage and that he is likely to succeed on the merits.

This Application is made and based on the said Complaint for Declaratory and Injunctive Relief a copy of which is attached hereto as Exhibit 1, the Emergency Motion for Summary Reversal and Injunctive Relief filed in the United States Court of Appeals for the District of Columbia Circuit on October 8, 1986 a copy of which is attached hereto as Exhibit 2, to which are attached

Exhibit A, Order filed on October 8, 1986 by United States District Judge Harold H. Greene, denying motion for temporary restraining order and dismissing the within action, Exhibit B, Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit C, Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order, Exhibit D, Affidavit of Oscar B. Goodman, Esq., and Exhibit E, Memorandum of Defendants in Opposition to Application for a Temporary Restraining Order, and Order filed on October 9, 1986 in the United States Court of Appeals for the District of Columbia Circuit.

DATED this 9th day of October, 1986.

OSCAR B. GOODMAN, ESQ.
530 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Howard W- Cannon by
HONORABLE HOWARD W. CANNON
499 South Capitol St., S.W., #400
Washington, D. C. 20003
Telephone: (202) 484-2100

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HAROLD H. GREENE, J.

HARRY E. CLAIBORNE)
)
Plaintiff,)
)
v.) C.A. # 86-2780
)
UNITED STATES SENATE, and)
George Bush, its President,)
Strom Thurmond, President Pro)
Tempore, Robert Dole, Majority)
Leader, and Robert C. Byrd, Minority)
Leader.)
)
Defendants.)

OCT 8 1986

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory and injunctive relief, pursuant to 28 U.S.C. 2201 and Rule 57, of Federal Rules of Civil Procedure, to enjoin and stay the impeachment trial of Judge Harry E. Claiborne, Plaintiff herein, presently before the United States Senate, and to determine and delineate the rights of Plaintiff under the Constitution of the United States with respect to a full and fair trial under Article I, Section 3, of the Constitution of the United States.

Exhibit 1

JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. 1331 and the jurisprudence of Powell v. McCormack, 395 vs. 486 (1969). This case is an action for preliminary and permanent injunctive relief to guarantee to Plaintiff, Harry E. Claiborne, a life-tenured, Article III federal district court judge a full and fair impeachment trial as mandated by the United States Constitution, Article III, Section I, before the full United States Senate, and to enjoin the named Defendants from denying him the same.

3. Venue properly lies in the District of Columbia pursuant to 18 U.S.C §1391 (e).

PARTIES

4. Plaintiff, Harry E. Claiborne, is a duly appointed and confirmed Judge under Article III of the U.S. Constitution, presiding in the U.S. District Court for the District of Nevada.

5. Defendant the United States Senate is one of two houses of the Congress of the United States of America, the legislative branch of the government.

6. Defendant George Bush is the Vice-President of the United States of America, and serves the constitutional function of President of the United States Senate and who oversees the impeachment trial.

7. Defendant Strom Thurmond is a United States Senator and serves the function of President pro tempore of the United States Senate.

8. Defendant Robert Dole is a United States Senator and is the Majority Leader of the United States Senate.

9. Defendant Robert C. Byrd is a United States Senator and is the Minority Leader of the United States Senate.

STATEMENT OF FACTS

10. Harry E. Claiborne is a life-tenured, Article III judge, who serves the United States District Court for the District of Nevada.

11. Plaintiff was the target and victim of an executive campaign of overreaching that led to his indictment for violations of federal statutes, including 26 U.S.C. 7602 (1).

12. Only after an arduous and calculated four (4) year campaign by the United States Justice Department was the Plaintiff indicted in a seven (7) count federal indictment.

13. In obtaining the initial indictment against Plaintiff, the government based its case almost entirely on the perjured testimony of a notorious brothel owner in Nevada, Joe Conforte.

14. Despite a calculated inhibition of his defense by the government and the trial court, four (4) counts of alleged serious judicial misbehavior were dismissed by the government on its own motion, and Judge Claiborne was acquitted of one (1) other count of making false statements on his judicial ethics form at trial.

15. Exculpatory materials and evidence were withheld by the government during Plaintiff's criminal trial in violation of the Jenks Act and Brady v. Maryland.

16. Upon retrial, Judge Claiborne was found guilty on two counts for violation of 26 USC 7206 (1).

17. After his conviction on August 14, 1986 Defendant the United States Senate, pursuant to S. Res. 481, accepted H. Res. 461 Impeaching Judge Harry E. Claiborne and agreed to the

appointment of a Senate Committee pursuant to Rule XI of the Standing Rules of the Senate to receive and to report evidence with respect to articles of impeachment. The Committee was characterized by Senator Mathias, Chairman of the Committee, as a "filter" committee.

18. The Committee recognized that its "charter" was unique in the annals of the Senate, as it had never been utilized before and was the product of Senate Rule XI and not the Constitution of the United States.

19. During proceedings of the Impeachment Trial Committee, Judge Claiborne and his counsel relied on the following statement of Chairman Mathias: "It had been created not in any sense to conduct a trial of this bill of impeachment, nor even to recommend the ultimate outcome of the process, but to develop the record on which the Senate may act."

20. The full Senate has voted to deny the Plaintiff a full and fair hearing and seeks, rather, to rely on the printed transcripts of the Senate Impeachment Trial Committee hearings, without live witnesses.

21. It has become necessary for Plaintiff to obtain the services of legal counsel named below.

Count One

22. In committing the acts and omissions alleged in paragraphs 1 through 20 of the Complaint, Defendants are derelict in their duties under Article III Section I of the U.S. Constitution.

Count Two

23. Plaintiff realleges the allegations contained in Paragraphs 1 through 21 of the Complaint and incorporates the same by reference as though fully set forth below.

24. In committing the acts and omissions alleged in paragraphs one through twenty of the Complaint, Defendants are derelict in their duty of impeachment under the Common Law.

Count Three

25. Plaintiff realleges the allegations contained in Paragraphs - through 21 of the Complaint and incorporates the same by reference as though fully set forth below.

26. In committing the acts and omissions alleged in paragraphs 1 through 20 of the Complaint, Plaintiff has been denied his right to due process of law under the Constitution of the United States.

Count Four

27. Plaintiff realleges the allegations contained in Paragraphs 1 through 21 of the Complaint and incorporates the same by reference as though fully set forth below.

28. In committing the acts or omissions alleged in paragraphs 1 through 20 of the Complaint, Defendants have deprived Plaintiff of his right to the effective assistance of counsel under the Sixth Amendment to the U.S. Constitution.

Count Five

29. Plaintiff realleges the allegations contained in Paragraphs 1 through 21 of the Complaint and incorporates the same by reference as though fully set forth below.

30. In committing the acts or omissions alleged in paragraphs 1 through 20 of the Complaint, Defendants have denied Plaintiff

his right to confront his accusers under the Constitution of the United States.

WHEREFORE PLAINTIFF PRAYS AS FOLLOWS:

1. That Defendants, their agents, servants, employees, attorneys and all other persons in active concert or participation with Defendants be restrained and enjoined from any further proceedings in the Impeachment trial of Plaintiff, Harry E. Claiborne;

2. That the Court determine the rights of Plaintiff to a full and complete Impeachment trial before the U.S. Senate in conformity with his rights under the Fifth and Sixth Amendments to the U.S. Constitution, the confrontation clause of the U.S. Constitution, and Article III, Section I of the U.S. Constitution;

3. For reasonable attorney fees and costs;

4. For such other relief as the Court may deem just and proper.

Respectfully submitted

Oscar B. Goodman, Esq.
520 S. Fourth Street
Las Vegas, Nevada 89101
702-384-5563

Honorable Howard W. Cannon

David Z. Chesnoff, Esq.

Timothy E. Cory, Esq.

ATTORNEY FOR PLAINTIFF

RECEIPT IS HEREBY ACKNOWLEDGED of a copy of the foregoing Complaint for Declaratory and Injunctive Relief, together with the accompanying Motion for Temporary Restraining Order and Preliminary Injunction, Rule 65(b) Affidavit, Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order, and proposed Temporary Restraining Order on this _____ day of October, 1986, at the hour of ___ p.m.

____
[illegible]
Legal Counsel
United States Senate

____
[illegible]
General Counsel
House of Representatives

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED
OCT 8 1986
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE,

Appellant,

vs.

UNITED STATE SENATE
and George Bush, its
President, Strom Thurmond,
President Pro Tempore,
Robert Dole, Majority
Leader, and Robert C. Byrd,
Minority Leader,

Appellee.

No. 86-2780

EMERGENCY MOTION FOR SUMMARY REVERSAL AND INJUNCTIVE RELIEF

This is an emergency motion pursuant to Rule 6(j) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit for relief from the Order denying appellant's motion for temporary restraining order and dismissing the action in Civil Action No. 86-2780 in the United States District Court for the District of Columbia, entitled "Harry E. Claiborne, Plaintiff, v. United States Senate, et al., Defendants."

Rule 6(j) provides as follows:

> "Emergency Motions. Any party requesting emergency action upon a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the Court to receive and consider a response shall label the motion an "Emergency Motion" and shall state in the motion the nature of the emergency and the date by which court action is necessary. The motion or accompanying

Exhibit 2

> memorandum shall state the reasons for granting the requested relief and specifically shall discuss each of the following factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. The motion must be filed at least seven days before the date by which court action is necessary, or counsel must explain why it was not so filed. Counsel filing the motion shall make every practicable effort to serve the motion personally or to notify opposing counsel promptly by telephone and shall describe in the motion or accompanying memorandum the efforts made so to serve or notify."

Pursuant to General Rule 6(g), a copy of the Order of the District Court from which relief is sought is attached hereto as Exhibit A.

Because time is of the essence, Appellant incorporates by reference the Motion for Temporary Restraining Order and Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining Order, copies of which are also attached hereto as Exhibits B and C, respectively.

Appellant filed the action below for declaratory and injunctive relief on October 8, 1986 following the unprecedented decision by the United States Senate not to conduct a full and complete trial of Impeachment of the Articles of Impeachment presented by the House of Representatives on August 14, 1986 against the Honorable Harry E. Claiborne, a United States District Judge for the District of Nevada (Article III, United States Constitution). See the affidavit of Oscar B. Goodman, Esq., a copy of which is attached hereto as Exhibit D.

In 1978 the Appellant was appointed a United States District Judge.

In 1979, the Appellant, Judge Claiborne, became the target and object of a "vendetta" by certain individuals within the Department of Justice, due to his open criticism of certain Justice Department tactics in Nevada and his inclination to protect individuals' rights and liberties under the Constitution.

In 1983, following a four-year multi-million dollar investigation, Judge Claiborne was indicted in a seven-count felony indictment. Following a mistrial, due to the jury's inability to reach a verdict on any of the courts of the indictment, the government dismissed four of the counts and retried Judge Claiborne on the three remaining counts (26 U.S.C. 7206(1), 18 U.S.C. 1001) in 1984. Although Judge Claiborne raised the issue of governmental misconduct and selective prosecution, no evidentiary hearing has ever been had.

Following conviction at the second trial on two counts of failure to report income (26 U.S.C. 7206(1)) and affirmance by a specially designated panel of the United States Court of Appeals for the Ninth Circuit, impeachment proceedings were instituted by the House of Representatives, Articles of Impeachment having been received by the United STates Senate on August 14, 1986.

Judge Claiborne has steadfastly maintained that he was denied a fair trial and due process of law through governmental misconduct and the withholding of exculpatory evidence (Brady material and Jenks Act material).

Pursuant to Rule 11 of the Standing Rules of the United States Senate, a 12-member panel began hearing evidence on impeachment on September 15, 1986. The scope of the impeachment proceeding has been limited to evidence directly related to the conviction for violation of 26 U.S.C. 7602(1), and Judge Claiborne has again been denied an opportunity to present his claims of governmental abuse.

Under the latest tack by the United States Senate, Senators will not hear "live" testimony of witnesses but rather are directed to the four-volume record of the transcript of proceedings before the Senate Impeachment Trial Committee. The Senate is rushing through this impeachment without a trial so that it can adjourn the session and is ignorning its mandate under Article III, Section 1, of the U. S. Constitution.

Necessity for Emergency Action

Judge Claiborne continues to be treated differently than any other citizen. Historically, impeachment proceedings have lasted 16 to 17 days. The Senate proposes to spend only one day on Judge Claiborne's impeachment.

Judge Claiborne challenges the constitutionality of Senate Rule XI, which delegates duties of the Senate under Article III, Section 1, of the Constitution to a 12-member panel, and the limiting of the scope of the evidence thereunder.

Argument

1. Appellant is likely to prevail on the merits.

His Honor United States District Judge Harold H. Greene, in his decision from the bench in the late afternoon of October 8, 1986, stated to counsel for Judge Claiborne that this action truly was an "emergency" application unlike so many that are filed as such. Judge Greene held that the action was not premature and conceded that the prospective injury was irreparable. He reluctantly determined, however, that he was without power to proceed.

Judge Claiborne respectfully suggests that Judge Greene was not fully informed or aware of the power available to him to ensure that Due Process is applied in an impeachment proceeding.

The leading case is Powell v. McCormack, 395 U.S. 496 (1969). In Powell, the Congress refused to seat Representative Adam Clayton Powell based upon its determination that he was guilty of improprieties. Powell was extended at least two different hearings at which he was represented by counsel. Powell was invited to testify before a committee, the select committee, consisting of nine lawyer Members of Congress, much like the Senate Impeachment Trial Committee appointed for Judge Claiborne.

Powell requested that certain "adversary type procedures be followed." 395 U.S. at 491. Specifically, he requested that he be given due process to include notice of the charges including a bill of particulars, the opportunity to confront any accuser, to attend all committee sessions where evidence was given and to cross examine, public hearings, the right to have the Select Committee issue process to summon witnesses for his defense, and a transcript of every hearing. 395 U.S. at 491, footnote 1.

The United States Supreme Court determined that it had the power and the authority to determine whether or not the procedures extended by the House of Representatives comported with basic due process.

In so holding, the Supreme Court diposed of the objections of the House and relied upon solid precedent.

The Court cited with approval its prior decision in Kilbourn v. Thompson, 103 U.S. 168 (1881), in which the Court determined that actions of the House of Representatives in punishing one of its own members was void. In Kilbourn, the Court found that the House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned. Kilbourn, after holding that the judicial power is vested in the Supreme Court and in inferior Courts, 103 U.S. at 192, criticized the Congress for not only exceeding its power but for doing so without proper inquiry.

The Congress had resolved that the United States was a creditor of a real estate pool. The Court's decision, in declaring the resolution void, queried. "How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors. . . ." 103 U.S. at 194. The Court found that the Congress had conducted its (the Congress') investigation in excess of the power conferred upon it, and the Court determined that all its related actions, including the jailing of one of its Members for contempt, were void, since it had no authority to require Kilbourn, the alleged contumacious Member, to testify.

The Speech and Debate Clause

Dicta in Powell, traced back to Kilbourn, unfairly suggests a restrictive reading of the Speech and Debate Clause of

Article I, Section 6, of the U. S. Constitution.

Kilbourn held only that individual members of the Congress were not personally liable to Kilbourn for false arrest as a result of his incarceration for refusing to answer questions in an ultra vires inquiry. 103 U.S. at 196.

This case is justiciable.

His Honor Judge Greene expressed his concern that the Court could not supervise the Senate in determining the relevance of evidence to be admitted at the Impeachment Trial.

Certainly the Court will not be expected to second-guess every evidentiary ruling of the Senate. Where, however, the Senate completely refused to conduct a trial sufficient for all voting members to exercise an informed decision, the precedent of Kilbourn and Powell allows and requires the judiciary to determine that the Senate has failed to provide basic due process, and the Court may determine that the action is void.

The standards for determination of justiciability are set forth in Powell at 395 U.S. at 517. The Court must determine whether the "duty asserted can be judicially identified and its breach judicially determined and whether the protection for the right asserted can be judicially molded." 395 U.S. at 517, citing to Baker v. Carr, 369 U.S. 186, 198 (1962). Since Kilbourn and Powell establish the first two prongs, the trial court's concern is whether the judiciary can mold effective relief for Judge Claiborne.

It is respectfully submitted that the Court can, should, and must do so. The Court is not asked to sit at the shoulder of the presiding officer of the Senate. The Court is only asked to require that the Senate allow the presentation of testimony, either live or by videotape, during sessions of the full Senate at which a quorum of the Senate is present.

Such a remedy will not impinge upon the independent exercise of the Senators' individual discretion in voting or on the independence of the Senate as a body. Such a remedy will only require that any determination of the Senate will be arrived at as the result of a fundamentally fair proceeding, in which, to the greatest extent possible, votes are cast in an informed manner.

In Powell, moreover, the Supreme Court specifically held that, when the relief sought is a declaratory judgment pursuant to the Declaratory Judgment Act, the Court need not even consider the appropriateness of coercive relief. 395 U.S. at 517.

This action is not foreclosed by the political question doctrine.

The political question doctrine was unsuccessfully raised by counsel for the House of Representatives in Powell, supra. The Supreme Court correctly viewed this as a crucial issue to be resolved and explained. The Court's opinion traced the history of the exclusion power, comparable in effect to the impeachment power, through its parliamentary roots. The Court noted that such a "political" power had been abused, particularly towards John Wilkes and Robert Walpole. 395 U.S. at 529-30. The Supreme Court noted that the colonists' observation of the wrongful exclusion of

John Wilkes in particuar "had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a cause celebre for the colonists." 395 U.S. at 530-31.

Against this background, the Supreme Court determined that elected officials could be wrongfully subjected to pressures from other elected officials.

The same policy considerations apply to the Impeachment of an appointed official, especially one who has made a prima facie case that he was singled out by a hostile segment of the United States Department of Justice.

The reasoning of Powell is just as applicable to the situation of Judge Claiborne.

2. Appellant will suffer immediate and irreparable injury if relief is withheld.

His Honor United States District Judge Harold H. Greene correctly found that the issues presented by Judge Claiborne are ripe. Implicit in that conclusion is a finding of irreparable injury flowing to Judge Claiborne.

Judge Claiborne seeks nothing more than to require the United States Senate to do what is must--to conduct a full and fair Impeachment Trial as enviosned by the framers of the U. S. Constitution. The Senate's decision to rely solely on the burdensome albeit incomplete record compiled by the Senate Impeachment Trial Committee under Rule XI of the Standing Rules of the Senate amounts to nothing more than trial by committee. If the Senate is permitted now to delegate its Article III, Section 1, mandate as the "sole trier" in Impeachment, what would prevent the Senate from later delegating that duty to a committee of five . . . or three . . . or one?

Although at least 32 Senators recognize the mandate of a full and complete Impeachment trial before the body of the Senate, absent intervention by this Court, the bell will toll for Judge Claiborne on October 9, 1986 when the Senate votes on the four Articles of Impeachment before it. The bell is impossible to unring.

Once Senators are forced to reach a decision based upon the limited evidence before them, absent the benefit of observing the demeanor of the witnesses, they will have developed a mind-set which is unlikely to be overcome at a later date. It is this cognitive decision-making process which Judge Claiborne seeks to preserve.

Removal under Article III, Section 1, is the severest and least reviewable judgment (save and except execution) which can be rendered against man. There is no pardon (as in the case of the murderer and rapist); there remains only faith in a just and merciful God in heaven. Indeed, the prospect of irreparable injury is no less than a certainty.

3. There is no possibility of harm to other parties.

If this Court were to grant the relief sought, the Senate would likely complete its legislative business and adjourn the General Session. The Senate would then have the option of returning for a Special Session in November (after the general election), as suggested by Senator Ted Stevens on October 7, 1986, or of putting over the Impeachment Trial for the early months of 1987 (when there is little legislative activity before the body of the Senate.

Judge Claiborne has already offered to tender his judicial salary to the Senate, pending a full and fair Impeachment Trial, and to forfeit the same if he is ultimately found guilty under any of the Articles of Impeachment. Judge Claiborne further assured the Senate that he would not assume any judicial duties pending a final resolution of the Articles of Impeachment in the event that he is released from his present condition of incarceration prior to such a determination. (Judge Claiborne would stipulate to the same conditions prerequisite to the granting of the relief sought herein.)

In denying Judge Claiborne's plea for a full and fair trial, the Senate has now embarked on a "rush to judgment," motivated not by notions of public trust and confidence, but hearkening rather to the "law of the calendar."

4. The public interest can only be served by the granting of the relief sought.

In T.I.M.E.-DC, INc. v. I.A.M. Nat. Pension, 597 F.Supp 256 (D.D.C. 1984), the district court found an "overwhelming [public] interest" in "assuring that . . . fiduciaries . . . make well informed impartial decisions within their statutory guidelines." Supra at p. 265.

How better could the interests of the public be served than by requiring the Senate to perform its duties under Article III, Section 1, which are not legislative functions but rather are constitutionally mandated.

In a case very similar to Judge Claiborne's, this Court reversed the denial by the district court of injunctive relief and ordered that the district court immediately enter an injunction. National Ass'n of Farmworkers, etc. v. Marshall, 628 F.2d 604 (D.C. Cir. 1980).

> "In sum, we conclude that the three factors ignored by the district court clearly favor the plaintiffs. It may well be that a preliminary injunction was warranted even if the district court had correctly concluded that plaintiffs would not be likely to prevail on the merits. Even if that were the case, plaintiffs needed only to present a 'serious legal question' for preliminary relief to be granted under the other circumstances of the case."

Supra, at p. 616. The trial court in Marshall, supra, as did Judge Greene here, apparently placed supreme importance on its assessment of plaintiff's likelihood of sucess on the merits.

Upon its own appraisal of the merits of the case, and particularly in light of the other three prerequisites to injunctive relief, this circuit granted precisely the relief which Judge Claiborne now seeks. Supra, at pp. 416, 421.

Finally, it must be observed that a stay of the Impeachment Trial (which has been broadly televised through the nation), together with a full and fair hearing by the body of the Senate, would give the Senate a greater opportunity to embrace the informed will of their electorate.

Accordingly, the District Court's Order denying the Motion for Temporary Restraining Order and dismissing the action below should be reversed with instructions to immediately issue the requested injunctive relief. Absent such relief, the clear intent of the framers of our Constitution will yield to doctrine of expediency and efficiency. And each member of the United States Senate will reflect upon Judge Claiborne with the silent acknowledgement: "But for the grace of God go

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone (702) 384-5563 and
HONORABLE HOWARD W. CANNON

By ______________________
Oscar B. Goodman

____
DAVID Z. CHESNOFF, ESQ.

____
TIMOTHY [illegible], ESQ.

____
[illegible], ESQ.

____
[illegible], ESQ.

Attorneys for Appellant

CERTIFICATE OF SERVICE

The foregoing Emergency Motion for Summary Reversal and Injunctive Relief was served on the appellees, contemporaneously with the filing hereof with the Clerk of the United States Court of Appeals for the District of Columbia Circuit, by delivering a copy thereof to Michael Davidson, Esq., Senate Legal Counsel, Hart Senate Office Building, Washington, D. C. in care of a member of the U. S. Capitol Police, and to [illegible], Esq., Assistant United States Attorney for the District of Columbia, at the United States Courthouse, Judiciary Center Building, 555 Fourth Street, Washington, D. C. in care of a guard (second floor), on this _____ day of October, 1986, at approximately _____ ___. M.

[illegible], Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE,
Plaintiff,
v.
UNITED STATES SENATE, et al.,
Defendants.

Civil Action No. 86-2780

FILED
OCT 8 1986
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of plaintiff's motion for a temporary restraining order, the arguments advanced by counsel at a hearing this date, and in accordance with the reasons stated by the Court at the hearing on plaintiff's motion for a temporary restraining order, it is this 8th day of October, 1986

ORDERED that plaintiff's motion for a temporary restraining order be and it is hereby denied; and it is further

ORDERED that the above-entitled action be and it is hereby dismissed.

HAROLD H. GREENE
United States District Judge

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE,)
PLAINTIFF,)
V.) CIVIL ACTION 86-2780
UNITED STATES SENATE, ET AL,)
DEFENDANTS.)

OCTOBER 8, 1986
WASHINGTON, D. C.

WHEREUPON, THE ABOVE-ENTITLED MATTER CAME ON FOR A TEMPORARY RESTRAINING ORDER BEFORE THE HONORABLE HAROLD GREENE, UNITED STATES DISTRICT COURT JUDGE, IN COURTROOM NUMBER ONE, AT APPROXIMATELY 6:33 O'CLOCK P.M.

APPEARANCES:

OSCAR GOODMAN, ESQUIRE
DAVID Z. CHESNOFF, ESQUIRE
TIMOTHY S. CORY, ESQUIRE
HOWARD W. CANNON
ON BEHALF OF THE PLAINTIFF

MICHAEL DAVIDSON, ESQUIRE
MORGAN FRANKEL, ESQUIRE
ON BEHALF OF THE DEFENDANTS

LAURA M. BEASLEY
OFFICIAL COURT REPORTER
(202) 371-1843

PROCEEDINGS

(EXCERPT OF THE PROCEEDINGS.)

THE COURT: PLAINTIFF STATES THAT, IN A NUMBER OF WAYS, HE WILL BE DEPRIVED OF HIS RIGHTS GUARANTEED BY THE CONSTITUTION, VARIOUS LAWS OF THE UNITED STATES, RULES OF CIVIL AND CRIMINAL PROCEDURE AND OF EVIDENCE, AND THE PROCEDURAL RULES OF THE SENATE. BUT IT IS FAIR TO SAY THAT THE PRINCIPAL COMPLAINT IS THAT HE WAS DEPRIVED OF THE RIGHT TO HAVE ALL MEMBERS OF THE SENATE THERE AT HIS TRIAL TO OBSERVE THE DEMEANOR AND LISTEN, RATHER THAN TO HAVE A COMMITTEE MAKE THE RECORD, WHICH THEN THE REST OF THE SENATE COULD OR COULD NOT LOOK AT AS THEY CHOSE.

THE RULES OF THE SENATE DO PROVIDE FOR COMMITTEE CONSIDERATION, AND APPARENTLY HAVE SINCE 1937, AND, OF COURSE, THE ENTIRE SENATE HAS THE RECORD BEFORE IT, AT LEAST PROCEDURALLY IT DOES; ALTHOUGH WE ARE NOT SURE, AND I SUPPOSE WE CAN SURMISE THAT NOT ALL HAVE READ ALL OF THE EVIDENCE.

IT IS UNFORTUNATE IN A WAY THAT EVIDENCE ON IMPEACHMENT WAS TAKEN THROUGH A COMMITTEE FOR THE FIRST TIME, APPARENTLY, IN THE HISTORY OF THE REPUBLIC. IT IS TRUE THAT THE SENATE AND THE HOUSE ARE BODIES WITH VERY IMPORTANT BUSINESS, AND THEY MUST MAKE ALLOWANCES FOR THAT IN SOME WAY, JUST AS THE GENERAL WORK OF THE CONGRESS IS MORE AND MORE DONE BY COMMITTEES AND BY STAFF MEMBERS, BUT WE CANNOT FORGET THAT THIS IS A SHORTCUT WHICH HAS BEEN USED FOR THE

FIRST TIME IN THIS PROCEEDING INVOLVING JUDGE CLAIBORNE.

BUT THE QUESTION IS NOT WHETHER I, OR ANY OTHER JUDGE, WOULD HAVE ORGANIZED THE IMPEACHMENT PROCESS AND IMPEACHMENT PROCEDURE THE WAY IT WAS ORGANIZED IN THIS INSTANCE THIS MONTH, BUT THE QUESTION IS WHETHER THIS COURT HAS THE AUTHORITY TO INTERFERE WITH THE CHOICE MADE BY THE SENATE. IN MY JUDGMENT, THE ANSWER IS CLEARLY NO.

I DO NOT TAKE GREAT STOCK IN THE GOVERNMENT'S ARGUMENT THAT THIS LAWSUIT IS PREMATURE. IF NOT NOW, WHEN? IF JUDGE CLAIBORNE HAS A RIGHT TO SEEK ASSISTANCE FROM THE JUDICIARY, NOW IS THE TIME, THE ONLY TIME IT WILL DO HIM SOME GOOD, BUT THERE IS A MORE FUNDEMENTAL OBSTACLE TO PLAINTIFF'S REQUEST.

THE SPEECH AND DEBATE CLAUSE OF THE CONSTITUTION, ARTICLE I, SECTION 6, CLAUSE 1, STATES THAT THE SENATORS AND REPRESENTATIVES "SHALL NOT BE QUESTIONED IN ANY OTHER PLACE" FOR ANY SPEECH AND DEBATE IN EITHER HOUSE. THAT MEANS, AS POWELL AGAINST MCCORMACK TEACHES, THAT THEY MAY NOT BE CALLED INTO COURT TO DEFEND THEIR ACTIONS.

THE SUPREME COURT SAID IN GRAVEL AGAINST THE UNITED STATES THAT THE SPEECH AND DEBATE CLAUSE INCLUDES NOT JUST THE PASSAGE OR REJECTION OF PROPOSED LEGISLATION, BUT ALL OTHER MATTERS WHICH THE CONSTITUTION PLACES WITHIN THE JURISDICTION OF EITHER HOUSE, AND IMPEACHMENT SURELY IS THAT.

IT WOULD BE AN EXTRAORDINARY CONCEPT INIMICAL TO A DEMOCRATIC SOCIETY FOR A COURT TO HALT THE DEBATES OR VOTES OF AN ELECTED SENATE BECAUSE HE DOES NOT APPROVE OF THE METHODS WHICH HAVE BEEN USED. THE SENATE'S EXERCISE OF POWER TO TRY IMPEACHMENT IS CLEARLY NOT REVIEWABLE UNDER THE IMPEACHMENT CLAUSE ITSELF. ARTICLE I, SECTION 3, CLAUSE 6 PROVIDES THAT THE SENATE SHALL HAVE THE "SOLE" POWER TO TRY ALL IMPEACHMENTS.

AT LEAST ONE OTHER COURT HAS HELD IN THE RITTER CASE THAT THIS MEANS THAT NO OTHER TRIBUNAL HAS JURISDICTION OF CASES TRIED UNDER THE PROVISIONS WITH REFERENCE TO IMPEACHMENT.

THE FRAMERS WANTED TO MAKE IT QUITE CLEAR THAT IMPEACHMENT WAS SEPARATE AND DISTINCT FROM CRIMINAL AND CIVIL PROCESS OVER WHICH THE JUDICIARY HAS JURISDICTION. TO THAT END, THEY INCLUDED IN THE IMPEACHMENT PROCESS SEVERAL SAFEGUARDS, INCLUDING NOTABLY THAT A TWO-THIRDS MAJORITY IS NEEDED IN THE SENATE TO CONVICT.

I DO NOT MEAN TO SUGGEST THAT, IF A CONGRESSIONAL BODY OR MEMBER TOOK UNUSUAL AND EXTREME ACTIONS THAT WOULD BE HARD TO VISUALIZE; FOR EXAMPLE, HOLDING A CONTEMPTUOUS WITNESS IN CIRCUMSTANCES CONSTITUTING CRUEL AND UNUSUAL PUNISHMENT, OR THAT ALL BLACK JUDGES WERE IMPEACHED, BUT NOT ANY WHITE JUDGES, THAT A COURT COULD NOT INQUIRE OR EVEN INTERVENE. SCHOLARS HAVE SAID THAT THE DUE PROCESS

CLAUSE APPLIES EVEN TO THE IMPEACHMENT POWER.

BUT NONE OF THAT IS THIS CASE. AT BEST, WE HAVE PROCEDURES HERE WHICH DO NOT EMPLOY PRECISELY THOSE WHICH A COURT, A TRIAL COURT, IN THE FEDERAL SYSTEM WOULD EMPLOY.

TO THE EXTENT OF THAT DIFFERENCE, ARGUABLY PLAINTIFF IS NOT AS WELL-OFF AS HE WOULD HAVE BEEN OTHERWISE, BUT FROM THERE IT IS A FAR CRY TO A DENIAL OF DUE PROCESS OR SUCH A GROSS VIOLATION OF ELEMENTARY RIGHTS THAT THIS COURT WOULD BE JUSTIFIED IN INTERVENING, NOTWITHSTANDING THE PRINCIPLE I HAVE DISCUSSED.

THE MOTION FOR A TEMPORARY RESTRAINING ORDER WILL BE DENIED, AND THE ACTION WILL BE DISMISSED.

COURT WILL BE IN RECESS.

MR. GOODMAN: EXCUSE ME, YOUR HONOR. AT THIS TIME I WOULD LIKE TO FILE A NOTICE OF APPEAL WITH THE COURT. MAY I DO THAT?

THE COURT: ABSOLUTELY.

MR. GOODMAN: THANK YOU.

(THE ABOVE MATTER WAS CONCLUDED AT 6:38 P.M.)

CERTIFICATE OF REPORTER

THIS RECORD IS CERTIFIED BY THE UNDERSIGNED REPORTER TO BE THE OFFICIAL RECORD OF THE ABOVE-ENTITLED MATTER.

Laura M. Beasley

LAURA M. BEASLEY

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE)
Plaintiff,)
)
v.) C.A. #
)
UNITED STATES SENATE,)
George Bush, its President,)
Strom Thurmond, President Pro Tempore,)
Robert Dole, Majority Leader,)
Robert C. Byrd, Minority Leader)
)
Defendants)

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This motion comes before the Court on an emergency basis because if the Court does not grant a temporary Restraining Order, the Plaintiff, will be immediately and irreparably harmed.

Background

In 1978, Plaintiff, Judge Harry E. Claiborne, was appointed a United States District Court Judge for the District of Nevada under Artl. III of the U.S. Constitution.

In 1979 Judge Claiborne became the target and object of a "vendetta" by certain individuals within the Department of Justice, due to his open criticism of certain Justice Department tactics in Nevada and his inclination to protect individuals' rights and liberties under the Constitution.

Exhibit B

In 1983, following a four-year multi-million dollar investigation, Judge Claiborne was indicted in a seven-count felony indictment. Following a mistrial, due to the jury's inability to reach a verdict on any of the counts of the indictment, the government dismissed four of the counts and retried Judge Claiborne on the three remaining counts (26 USC 7206 (1), 18 USC 1001) in 1984. Although Judge Claiborne raised the issues of governmental misconduct and selective prosecution, no evidentiary hearing has ever been had.

Following conviction at the second trial on two counts of failure to report income (26 USC 7206(1)), and affirmance by a specially designated panel of the U.S. Court of Appeals for the Ninth Circuit, impeachment proceedings were instituted by the House of Representatives, Articles of Impeachment having been received by the Senate on August 14, 1986.

Judge Claiborne has steadfastly maintained that he was denied a fair trial and due process of law through government misconduct and the withholding of exculpatory evidence (Brady material and Jeaks Act material).

Pursuant to Rule 11, Standing Rules of the Senate, a 12-member panel began hearing evidence on impeachment on September 15, 1986. The scope of the impeachment proceeding has been limited to evidence directly related to the conviction for violation of 26 USC 7602(1), and Judge Claiborne has again been denied an opportunity to present his claims of government abuse and overreaching. These claims must be heard, not only because of their serious nature, but because the circumstances of the investigation go directly to Judge Claiborne's state of mind or intent at the time of the signing of the tax returns in question.

Although the Senate Impeachment Trial Committee recognized that it was not the trier of fact, the leadership of the Senate has now undertaken to "wrap up" the impeachment trial in approximately 8 hours. Under the latest tact by the Senate, Senators will not hear "live" testimony of witnesses but are directed to the four-volume record of transcript of proceedings before the Impeachment Trial Committee. The Senate is rushing through this impeachment trial so it can adjourn the session and has forgotten its mandate under Article III, Section 1, of the Constitution of the United States.

Necessity for Emergency Action

Judge Claiborne continues to be treated differently than any other citizen. Historically, impeachment proceedings have lasted 16 to 17 days. The Senate proposes to spend one day on Judge Claiborne's trial;

Judge Claiborne challenges the constitutionality of Senate Rule XI which delegates duties of the Senate under Article III, Section 1 of the Constitution to a 12 member panel, and the limiting of the scope of the evidence thereunder.

Legal Standard

As set forth in the accompanying Points and Authorities, Judge Claiborne's rights are in immediate peril. If the Senate is permitted to deliberate on the merits of the four Articles of Impeachment without the benefit of a full and fair trial, there can be no recapture of the mind-set of the Senate. Judge Claiborne's rights guaranteed under the Constitution would be forever lost.

The relevant standard under Rule 65, Federal Rules of Civil Procedure, and of this district, is met here. The discussion within established the likelihood of prevailing on the merits, the jeopardy to Judge Claiborne, and the public interest in preserving the sanctity of the Impeachment Process and the rights guaranteed thereunder.

Dated this 7th day of October, 1986.

Respectfully submitted:

Oscar B. Goodman, Esq.
520 S. Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563

Honorable Howard W. Cannon

David Z. Chesnoff, Esq.

Timothy S. Cory, Esq.

ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE

Plaintiff,)

v.) C.A. #

UNITED STATES SENATE,
George Bush, its President,
Strom Thurmond, President Pro Tempore
Robert Dole, Majority Leader
Robert C. Byrd, Minority Leader

Defendants

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiff in the above entitled action has sued the Defendants for injunctive and declaratory relief to prevent the irreparable harm to the plaintiff of his removal as a life-tenured Article III judge without the constitutionally-mandated trial described in Article I, Section 3, of the U.S. Constitution, the common law surrounding impeachment, and the Federalist Papers.

The sole purpose of Plaintiff's Motion for Temporary Restraining and Preliminary Injunction Order is to simply require that a trial, as contemplated by the Constitution and the Framers

Exhibit C

thereof, be held before the entire United States Senate and that this historically significant event not pass without conforming to constitutional requirements. Indeed, the Plaintiff asks for only a careful and reasoned judgment of his conduct, without concerns for legislative calendar deadlines and the concomitant rush to judgment.

I. STANDARDS FOR GRANTING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The lawful standards for granting a temporary restraining order are the same as those for granting a preliminary injunction. See e.g. United States v. Phillips, 527 F.Supp. 1340 (D.Ill, 1981); Huges v. Christofane, 486 F.Supp. 541 (D.Md. 1980); Werzenburg v. Town of Manashu, 401 F.Supp. 801 (D.Wis. 1975).

In T.I.M.E. - DC, Inc. v. I.A.M. National Pension Fund, 597 F.Supp. 256, 262 (D.D.C. 1984) (injunction granted), this Court, citing the leading case of National Association of Farmworkers Organizations v. Marshall. 628 F.2d 604 (D.C.Cir.1980), delineated four factors to be considered by a court in determining the propriety of issuing an injunction. Those four factors were originally described in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958).

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . . (2) Has the petitioner

> shown that without such relief, it will be irreparably injured? . . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . . (4) Where lies the public interest?

The Plaintiff respectfully submits that his position fulfills all four requirements. First, the historical and legal precedent, as described infra, explicitly endorses the Plaintiff's position that he is entitled to a full and fair trial. Indeed, if the Senate proceeds as presently scheduled, the Plaintiff will be the first impeached judge ever to be denied a full trial before the United States Senate. As such, he has shown he is likely to prevail on the merits. Second, without the relief sought instanter, the Plaintiff, a representative of an independent federal judiciary will be subjected to a constitutionally deficient proceeding which will irreparably damage him, by removing him from the bench forever. Third, there is no harm to either the House of Representatives or the United States Senate if the proceedings are delayed until a time not in conflict with the legislative calendar which calls for the earliest possible adjournment of the Congress. the Plaintiff has offered to put his salary in escrow and not to resume his judicial duties until a final decision by the Senate. Fourth, the public interest absolutely lies in having a trial before the full Senate. The impeachment trial is contemplated as an important part of our system of checks and balances. In the instant case, where the Plaintiff insists that his indictment was a product of executive overreaching calculated to intimidate the federal judiciary, the public interest is best served by a contemplative and complete trial before the entire Senate to preserve the sanctity of the separation of powers. See also Sierra Club v. Block, 614 F.Supp. 488, 492 (D.D.C. 1985) (injunction granted).

The Plaintiff would reiterate that purported Senatorial calendar constraints should not inhibit the issuance of the sought injunctive relief. The Senate in performing its constitutional function should be required to hold a full trial at a time when it can accomplish its constitutional duty. See Union of Concerned Scientists v. Nuclear Regulatory Commission, F.2d 1370 (D.C.Cir.1983).

II. THE UNITED STATES CONSTITUTION, THE FEDERALIST PAPERS, CASE LAW AND THE RULES OF THE SENATE MANDATE A FULL EVIDENTIARY TRIAL BEFORE THE ENTIRE UNITED STATES SENATE.

It is respectfully submitted, and acknowledged by Senate Impeachment Trial Committee Chairman, Senator Mathias, that the Committee's "charter" was "limited" and that the Committee was not "created . . . in any sense to conduct a trial of [the] bill of impeachment." Rather, it was for "the Senate to carry out . . its unique constitutional power to try all impeachments."

> . . . So there are particular moments in public affairs when the people, stimulated by some irregular passion . . . or misled by the artful misrepresentation of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passion? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statutes on the next." The Federalist, No. 63.

In the following, Judge Claiborne will reiterate the historical importance of permitting him to confront the witnesses against him and for his Honorable Court to order that the Senate permit him to call the witnesses he chooses so that the intent of Article I, Section III, of the United States Constitution can be assiduously adhered to by the Senate.

The Federalist Papers, which historian Clinton Rossiter described with little exaggeration as standing third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history (The Federalist, Mentor, 1961 at p. vii), justified the need for the Senate to assure a well-ordered and long-lived Republic to conduct such a proceeding.

The Framers wisely provided in Article One, Section Three, of the Constitution, that "The Senate shall have the sole Power to try all Impeachments." There are very few checks on the Judiciary and Executive power. The Federalist Papers make it clear that the sole power of impeachment is one of those necessary Constitutional checks.

Our system of constitutional government is based upon the remarkable concept of separation of powers, which has its roots in Western European struggles between legislative bodies and monarchs. See, W. B. Gwyn, The Meaning of the Separation of Powers (Tulane Univ., 1965).

English precedent formed the basis of the Framers of the Constitution's position as it relates to impeachment. Power consistently was passing between the King and the Parliament from the time of the English Civil War. These historical developments led to the formulation of a delineation of powers. J. Locke, Second Treatise of Government [An Essay Concerning the True Origin, Extent and End of Civil Government].

It was Montesquieu, however, whose writing were accepted throughout Western Europe and the American Colonies, in the Eighteenth Century, who captured the spirit upon which the Constitutional Framers relied. Montesquieu observed that any combination of judicial, legislative or executive powers would create a system whose path would lead to inescapable tyranny and absolutism. Montesquieu, The Spirit of the Laws, 151-2 (Nugent Trans. 1949).

Since the days of the American Revolution the concept and sanctity of the separation of powers has been embedded in our system of government.

The United States Constitution was drafted in a manner consistent with the rationale of Montesquieu. The Framers sought to establish a system of checks and balances between the branches of government to ensure the political independence of each branch and to prevent the cancerous growth of exorbitant power in any one branch of government.

The concept of checks and balances is relied upon by Judge Claiborne. The significance of the Senate permitting a full trial cannot be understated. It will ensure the functioning of our constitutional system; it must not accede to preconceptions or expediency.

Benjamin Franklin, in reflecting upon the moral imperative of impeachments wrote:

> What was the practice before this in cases where the chief magistrate endeared himself obnoxious? What recourse was had to assassination in which he was not only deprived of his life but of the opportunity of vindicating his character? It would be the best way, therefore, to provide in the Constitution for the regular punishment of the executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused. Benjamin Franklin, 1787 (emphasis added).

The Congress would have Judge Claiborne convicted without benefit of procedural and substantive due process and without an opportunity to vindicate his reputation. Judge Claiborne has claimed he has been improperly maligned and that his judicial function has been disrupted. These allegations are too serious to be ignored for expediency's name.

Significantly the Executive and the Courts did not bar his judicial trial. Why, then, should the impeachment trial not be accorded the same solemn autonomy? They are independent of each other. A Senate trial on the merits is mandated in order to assure that the power of the Executive does not become so wholly concentrated as to subvert and chill the function of an independent federal Judiciary.

If the Congress seeks to read impeachment in terms of the previous criminal prosecution it invites the bar of double jeopardy. Richmond Screw Anchor Co. v. U.S., 275 U.S. 331 (1928): U.S. v. Jim Fuey Moy, 241 U.S. 349, 401 (1916).

The integrity and independence of the Judiciary were protected by the Constitution by the appointment for life of Federal judges. The politically astute Framers, all of whom swelled within with the cause of liberty and protection of people's rights, recognized that this life term was necessary to insure a judiciary that would be independent, a judiciary which would and could protect the rights of the citizen from abuses by the Executive and Legislative Branches, without fear of reprisal.

In support of the concept of separation of powers as it related to impeachment, Alexander Hamilton wrote:

> Would there not be the greatest reason to apprehend that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another

> defend itself against attacks. The general liberty of the people can never be endangered so long as the judiciary remains truly distinct from both the legislative and the executive . . . [but] the judiciary is in continual jeopardy of being overpowered, awed, or influenced by its coordinated branches. [Hamilton, Federalist Papers] (emphasis supplied).

In effect the Senate is sanctioning the procedures chosen by the Executive, which resulted in indictment, conviction and incarceration of Judge Claiborne.

It should also be noted that the division of functions which assigned the role of prosecutor to the Commons while the Lords sat in judgment was the "model" of the parallel division of impeachment functions between the House of Representatives and the Senate. Federalist Paper No. 65 at 425.

The House of Representatives wants, as prosecutor, to convict Judge Claiborne. Unfortunately they sought their conviction by attempts to usurp Senatorial power and in derogation of the Constitution of the United States, in the name of expediency. The House of Representatives asked the Senate of the United States to ignore critical constitutional issues effecting the fabric of our system of government and the Senate did so.

The Honorable Harry E. Claiborne respectfully submits that our parallel House of Representatives/House of Commons, Senate/House of Lords impeachment procedures do not permit for less than a full trial before the entire Senate.

No research has shown of any reference to a Committee of the Lords for hearing of the evidence. The authoritative Faoul Berger, Charles Warren Senior Fellow in American Legal History, Harvard Law School, in his book, Impeachment: The Constitutional Problems (Harvard University Press, Cambridge, Mass., 1973, p. 171), has so found. A statement made by the Managers of the Lords at a conference between members of the Lords and Commons (reported January 18, 1691) confirms that "in the case of impeachments, which are the groans of the people . . . and carry with them a great supposition of guilt than any other accusation, there all the Lords must be judge." 4 Hatsell 343, 33, 342.

> When you are called upon to arraign an individual, and that individual a judge, everyone must be anxious that the attendance should be as full as possible. 7 Parl. Deb. 762 (1806). See also, Plucknett, Concise History, 232 of 1 Holdsworth 389 (7th Ed., 1956).

Judge Claiborne submits that impeachment is a carefully delineated process, tolerated only if exercised within bounds "limits" on Congress determined by Congress would be no limits at all. Federalists Papers Nos. 65 and 78. It "cannot be the natural presumption . . . that the legislative body are themselves the constitutional judges of their own powers . . . . "Federalist Paper No. 78 at 506.

Judge Harry E. Claiborne respectfully suggests that he not be faced with a similar scenario as existed at the time of the impeachment of President Andrew Johnson, that is that "prejudgment on the part of most senators . . . was brazenly announced." John Fitzgerald Kennedy, Profiles in Courage, 133 (N.Y., 1961).

III. EVIDENCE MUST BE HEARD ABOUT ALL THE EVENTS OCCURRING AT THE TIME OF THE ALLEGED ILLEGAL CONDUCT BY JUDGE CLAIBORNE, SO THAT THE SENATE AS THE TRIER OF FACT, CAN PROPERLY JUDGE HIS STATE OF MIND AT THE TIME IN DETERMINING HIS GUILT OR INNOCENCE.

Federal Rule of Evidence 803(3) contemplates statements confirming the mental condition of a defendant as they are sufficiently trustworthy. Dangers of misperception, faulty memory, or insincerity may be less when the evidence relates to existing mental, emotional or physical states of the defendant. Moore's Federal Procedure 803(3).

The Honorable Harry E. Claiborne and all who will testify about their perception and memory of events of the campaign against Judge Claiborne will be available for cross-examination.

It is significant that the House did not fully deny the claims of Judge Claiborne but rather would have them kept from the Senate. Clearly, the perceptions of Judge Claiborne of the events transpiring at the time he was alleged to have formed criminal intent to violate the tax laws must be publicly aired. To do otherwise would be to deny him due process. It is axiomatic that state of mind evidence is admissible to show lack of criminal intent.

In United States v. Taglione, 546 F.2d 194 (5th Cir., 1977), a defendant was charged with making extortionate demands for return of credit card invoices which he had forged. The defendant claimed that he had merely been negotiating for a reward. It was error to have excluded the testimony of the defendant's former attorney as to a conversation in which the defendant asked if it would be legal to negotiate for a reward. The statement is admissible pursuant to Federal Rule of Evidence 803(3). See also United States v. Ottley, 509 F.2d 667 (2d Cir., 1975) (regarding a union official charged with a violation of federal statute requiring records be maintained in sufficient detail to substantiate claims for reimbursed cash expenses). State of mind was an issue because the statute applied only if its provisions were violated "wilfully". This principle applies to statements of third persons made to a principle. In Scholle v. Cuban-Venezuela Oil Voting Trust, 285 F.2d 318 (2d Cir., 1962), the Court held that the hearsay rule does not bar admission of statements used circumstantially, since, when so used, the primary focus of inquiry is whatever inferences can be drawn from the fact that the words were spoken and not the truth of what was said." 285 F.2d at 321.

Finally, "Impeachment" Miscellaneous Documents, Committee on Rules and Administration, United States Senate (August 7, 1974), Memorandum IV On the Rules of Evidence for Senate Impeachment Trials, makes it clear that it was deemed advisable that all evidence not trivial or obviously relevant shall be received without objection. It is respectfully suggested that evidence that tears at our constitutional heart and depicts intimidation of an independent judiciary cannot be characterized as trivial or irrelevant.

IV IN ORDER TO GUARANTEE JUDGE CLAIBORNE AND THE AMERICAN PEOPLE DUE PROCESS OF LAW AND THE TRIAL MANDATED BY THE UNITED STATES CONSTITUTION, IT IS RESPECTFULLY SUBMITTED THAT EACH SENATOR MUST VIEW THE WITNESSES AND THE EVIDENCE AND ANY ABBREVIATIONS OF THIS HISTORICALLY DOCUMENTED PROCESS, WOULD BE UNLAWFUL AND UNCONSTITUTIONAL.

A. Demeanor Evidence Is An Essential Element of a Fair Trial.

The demeanor of a witness traditionally has furnished the trier of fact with valuable information concerning the significance of testimony. Universal Camera Corp. v. N.L.R.B., 340 U.,S. 474, 495-496 (1951).

A witness testifying before the United States Senate Impeachment Trial, as many have done throughout our country's history, will undoubtedly be impressed with the solemnity of the occasion and the possibility of public disgrace. In fact, willingness to falsify may reasonably become more difficult. Judge Claiborne's detractors, unprotected by a less than full trial, as was the case in the judicial trial, will be compelled to be forthright or else they will be discovered by an insightful Senator.

Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

Cross-examination, and the co-extensive demeanor extracted therefrom, are a vital feature of our Anglo-American System of Justice. Cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth" 5 Wigmore 1367, p. 29.

The belief that the examination of live witnesses is effective in exposing imperfections of perceptions memory and narration is fundamental. Morgan, Forward to Model Code of Evidence 37 (1942).

Only by personal observation can the Senate weigh the credibility of a witness. Mr. Chief Justice Appelton wrote concerning observation of demeanor:

> "[T]he promptness and unpremeditatedness of answers or, the reverse, their distinctiveness essentials, their incorrectness in general, or particulars, their directness or evasiveness . . . The appearance and manner, the voice, the gestures, the readiness and promptness of their answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control - fear, love *hate*, *envy* or *revenge* - are all open to observation . . . " *Wigmore on Evidence*, 3d Edition, 1395; Appleton Evidence 220 (Emphasis added.)

In *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487, 488 (2nd Cir., 1952), the late Judge Jerome Frank eloquently wrote that demeanor evidence "has had a long history" and that:

> "[i]n the earlier period of Roman legal development, . . ., the witnesses testified orally before the judges, and the practice of having oral testimony heard by the judge

him testify . . . ".

The astute and scholarly Judge Frank further intoned:

> "For the demeanor of an orally-testifying witness is 'always assumed to be in evidence'. It is 'wordless language'. The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the Trial Court by his manner, his intonations, his grimaces, his gestures, and the like-all matters which "cold print does not preserve" and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were titled a 'rehearsing court', is not a seeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to produce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the

> him testify . . . ".

The astute and scholarly Judge Frank further intoned:

> "For the demeanor of an orally-testifying witness is 'always assumed to be in evidence'. It is 'wordless language'. The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the Trial Court by his manner, his intonations, his grimaces, his gestures, and the like-all matters which "cold print does not preserve" and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were titled a 'rehearsing court', is not a seeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to produce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the

record, may along have 'impeached' him."
Broadcast Music v. Havana, 175 F.2d 77, 80
(2nd Cir., 1950).

In conclusion, each and every Senator, in fulfilling his constitutional function as a trier of an impeachment, cannot rely solely on the written transcript of the committee hearing. After all, "the most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gesture which he had learned to associate with falsehood . . . ." "Every man must learn matters of this sort himself." N.L.R.B. v. Dinion Coil, supra at p. 489 (emphasis added).

The Senate, in fulfilling its constitutional mandate must provide this Article Three Judge with a full and fair opportunity to present the truth in order for him to be fully exonerated and restored to his independent role of dispensing the duties of his branch of government. In Powell v. McCormack, 395 U.S. 486, 506 (1969), the Supreme Court stated: "[i]t is the province and the duty of the judicial department to determine . . . whether the powers of any branch of the government . . . have been exercised in uniformity to the Constitution, and if they have not, to treat their acts as null and void." Plaintiff would respectfully request that this court issue the requested relief so that the Senate acts as constitutionally mandated.

Respectfully Submitted:

By ____________________________
OSCAR B. GOODMAN, ESQ.
520 So. Fourth Street
Las Vegas, Nevada
702-384-5563

By ____________________________
Honorable Howard W. Cannon

By ____________________________
David Z. Chesnoff, Esq.

By ____________________________
Timothy S. Cory, Esq.

ATTORNEYS FOR PLAINTIFF

CITY OF WASHINGTON)
) S.S. :
DISTRICT OF COLUMBIA,)

RULE 65 (b) AFFIDAVIT

OSCAR B. GOODMAN, being first duly sworn, deposes and says the following:

1. That I am an attorney licensed to practice law by the Supreme Court of the State of Nevada and have appeared in United States District Courts throughout the United States;

2. That I make this affidavit pursuant to Rule 65 (b) of the Federal Rules of Civil Procedure and solely upon information and belief;

3. That the pleadings were only completed on the morning of October 7, 1986;

4. That the pleadings were prepared in contemplation of adverse Senatorial decisions to be announced at late morning or early afternoon of October 7, 1986;

5. That I notified the office of Michael Davison, Counsel for the United States Senate, Defendant, at 1:45 p.m. ~~Tuesday~~ Wednesday, October ~~7~~ 8, 1986 that Plaintiff would seek the instant injunctive relief today, and that a courtesy copy of the relevant pleadings have been delivered to same;

6. That Plaintiff is scheduled for proceedings to begin for final decision by the Senate of his guilt or innocence of charges of impeachment brought against him by the House of

Exhibit D

Representatives on October ~~7~~ 8, 1986, and this action is necessary to enjoin those proceedings so to prevent a grave abrogation of constitutional law which guarantees to the Plaintiff and to our country an autonomous and full trial before the United States Senate;

7. That the Senate has denied the Plaintiff the opportunity to subpoena witnesses in his defense and has placed inhibiting time constraints for the presentation of his defense which will limit the proceedings before the whole Senate to just one day;

8. That cross-examination will not take place, but rather the Senate will rely on the transcripts of seven (7) days of hearings which your affiant is unconvinced could even be digested in the few days that those transcripts have been available to the Senators, especially in light of their acknowledged busy legislative schedules and desire to adjourn for the year;

9. That the Senate further refuses to allow the Plaintiff to raise the issue of unlawful governmental targeting of the Plaintiff by forbidding the Plaintiff to present witnesses ready, willing and able to so testify;

10. That the instant relief is sought in the public interest in justice and not for purposes of delay.

11. That at 12:15 p.m the United States Senate voted 61-32 to foreclose the Body from receiving any testimony from witnesses (either in person or on video), or other evidentiary presentation.

12. I am informed that the United States Senate will vote on the Articles of Impeachment within the next twenty four (24) Hours

Dated this 8th day of October, 1986.

Time: 1:12 p.m.

OSCAR B. GOODMAN, ESQ.

Subscribed and sworn to before me this 3TH day of October, 1986

Sarah E. McAlhany
Notary Public
Sarah E. McAlhany

NOTARY PUBLIC
DISTRICT OF COLUMBIA

In and for said District of Columbia
My Commission Expires: ____________

MY COMMISSION EXPIRES JULY 31, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE,

Plaintiff,

v.

UNITED STATES SENATE, and George Bush, its President, Strom Thurmond, President Pro Tempore, Robert Dole, Majority Leader, and Robert C. Byrd, Minority Leader,

Defendants.

Civil Action No. 86-2780

MEMORANDUM OF DEFENDANTS IN OPPOSITION TO APPLICATION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

United States District Judge Harry E. Claiborne of the District of Nevada, the respondent in an impeachment trial currently underway in the United States Senate, has filed this action seeking immediate injunctive relief against the completion of the impeachment proceeding. The defendants oppose this unprecedented request that the Judiciary enjoin the performance by the Senate of its constitutionally committed "sole Power to try all Impeachments." U.S. Const., art. I, sec. 3, cl. 6.

Plaintiff's request for injunctive relief should be denied for the threshold reason that plaintiff's complaint is unripe for adjudication until the Senate has concluded the

Exhibit E

trial currently in progress. Until the completion of the trial has generated a vote of conviction or acquittal on the articles of impeachment exhibited against plaintiff by the House of Representatives, his assertion of harm remains speculative. Under this Circuit's rules governing the application of preliminary relief, plaintiff's purely speculative injury is outweighed by the fundamental right of a coordinate branch of the Government to perform its constitutional responsibilities free from interference. Plaintiff's lack of entitlement to preliminary relief is further demonstrated by his minimal likelihood of success on the merits. Plaintiff's complaint is independently barred by (1) the general principles of separation of powers, (2) the specific prohibition of the Speech or Debate Clause of the Constitution, and (3) the political question doctrine. Finally, if the merits of this controversy were ever adjudicated, the Senate's procedures in trying Judge Claiborne fully satisfy the requirements of the Constitution.

STATEMENT OF THE CASE

On July 22, 1986 the House of Representatives unanimously adopted House Resolution 461 impeaching District Judge Harry E. Claiborne of high crimes and misdemeanors. House Resolution 461 sets out four articles of impeachment alleging that Judge Claiborne willfully filed false income tax returns for 1979 (Article I) and 1980 (Article II) and that he has been convicted for those criminal offenses

(Article III).[1] The fourth Article alleges that Judge Claiborne's willful and knowing falsification of his 1979 and 1980 tax returns "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts." After the House exhibited the articles of impeachment to the Senate,[2] the Senate convened as a court of impeachment, and an oath was administered to all Senators pursuant to the Constitution.[3] Then, the Senate adopted

---

[1] Upon a jury trial Judge Claiborne was convicted of two counts of 26 U.S.C. § 7206(1) (1982), which provides that

> Any person who ... [w]illfully makes and subscribes any [tax] return ... which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The conviction was upheld on appeal, United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 106 S.Ct. 1636 (1986), and Judge Claiborne was sentenced to two years' imprisonment for each violation, to be served concurrently, and a fine of $5,000 for each violation. He began serving his sentence on May 16, 1986 at Maxwell Air Force Base in Montgomery, Alabama.

[2] 132 Cong. Rec. S10535 (daily ed. Aug. 6, 1986).

[3] 132 Cong. Rec. S11672 (daily ed. Aug. 14, 1986). Article I, section 3, clause 6 provides that "[w]hen sitting for th[e] Purpose" of trying impeachments, the Senate "shall be on Oath or Affirmation."

Senate Resolution 480, which provided for the issuance of a summons commanding Judge Claiborne to file an answer to the impeachment articles, and Senate Resolution 481, which directed the Presiding Officer of the Senate to appoint a committee of twelve Senators, pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive and to report evidence to the Senate with respect to the articles of impeachment against Judge Claiborne.[4/]

Impeachment Rule XI authorizes the appointment of a Senate committee "to receive evidence and take testimony" and to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before [the] committee." Rule XI provides that the committee's report of its evidentiary proceedings "shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate." The Rule further stipulates that "nothing ... shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate."

[4/] See S. Res. 479, 99th Cong., 2d Sess. (1986)(amending Senate's impeachment rules).

The Senate adopted Impeachment Rule XI in 1935 in order to facilitate its conduct of impeachment proceedings without unduly sacrificing its ability to continue to perform its legislative duties. The use of a Senate committee to collect evidence for presentation to the Senate had first been proposed in 1912 by Senator (later Justice) Sutherland, in the midst of the Senate's twenty-two-day trial of Judge Robert W. Archbald. Senator Sutherland proposed that the Senate's impeachment rules be amended to provide "that in all impeachment cases hereafter instituted, except when the President or Vice President of the United States, a member of the Cabinet, or a member of the Supreme Court of the United States is impeached, the testimony may be taken by the Judiciary Committee and together with findings of fact reported to the Senate for its consideration and judgment." 49 Cong. Rec. 698 (1912). Senator Sutherland explained that, in the course of the Archbald trial,

> time has been taken away from the important business of the Senate. Many of the Senators could not be present to hear the testimony, and of necessity they are obliged to read it before they can act. The same result, it seems to me, would be obtained by referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate. Of course, the findings of fact which might be presented by the Judiciary Committee would only be advisory, and not binding on the Senate.

Id.

Although Senator Sutherland's resolution was not acted upon, his proposal resurfaced following the ordeal of another impeachment trial in 1933. As Senator Ashurst subsequently described, the ten-day trial of District Judge Harold Louderback had prompted "not a dozen, not 20, but at least 40 Senators [to] urge[] that the Senate Committee on the Judiciary give its attention to the question whether or not a committee appointed by the Presiding Officer could take the testimony in impeachment trials." 80 Cong. Rec. 3425 (1936). The Senate adopted Rule XI to permit the use of a committee to compile an evidentiary record for the Senate in order

> to avoid what always takes place in an impeachment trial before the Senate. There are times when there is not a quorum of the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have to read the evidence in the RECORD in order to know what it is.

78 Cong. Rec. 9929 (1934)(Sen. Norris).[5]

In its consideration of Rule XI, the Senate discussed the constitutionality of the receipt of evidence by a committee. Responding to an assertion that an impeached officer is "entitled to a full trial in every respect before the entire Senate if he should ask for it," id., 9928 (Sen. Borah), Majority Leader Robinson stated, "I should think the Senate would be the judge of whether it wished to hear the witnesses in person, or to take their testimony by deposition, or in some other way.... Mr. President, in my judgment, the taking of testimony by a committee constitutes part of the trial by the Senate," id. In Senator Norris's view, the Senate would "delegate to a committee the tedious task of taking the evidence," but "[t]he trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." Id., 9929.

---

[5] While it was considering the proposal, the Senate was also aware of a potential impeachment trial arising from a pending House investigation of District Judge Halsted L. Ritter. As it developed, although Judge Ritter was impeached following the adoption of Rule XI, the Senate chose not to use the newly adopted Rule during the Ritter trial.

As adopted, Rule XI authorizes the appointment of a committee to report to the Senate only "a certified copy of the transcript of the proceedings and testimony had and given before such committee." Id., 9927. The Senate determined not to permit a committee receiving impeachment evidence to make any recommendations to the Senate on the ultimate impeachment question, but merely to report to the Senate a certified record of evidentiary proceedings, "leaving it to the Senate and remitting to the Senate its power and right and sole authority to determine the questions of relevancy, materiality, and the weight of the evidence. The committee would make no recommendations." Id. (Sen. Ashurst).[6]

The appointment of a committee to collect evidence with respect to Judge Claiborne's impeachment generated the first use of Rule XI. Following the committee's organizational meeting on August 15, 1986, the House managers and counsel for the plaintiff were invited to file any necessary pretrial motions before the committee began hearing testimony.[7] Both parties filed a number of motions, which were argued before the committee on September 10 and September 15, 1986. The committee granted a motion by the House to accept into evidence certain evidence from Judge Claiborne's criminal trials[8] and granted in part a House motion to exclude evidence of prosecutorial or judicial misconduct.[9] The committee referred to the full Senate House motions for summary disposition of the third article of impeachment, which relies solely upon the fact of the plaintiff's criminal conviction, and for application of collateral estoppel to the factual issues alleged in the first two articles of impeachment. The committee ruled that it lacked jurisdiction "to grant judgment on any article of impeachment, and we have no authority to make any findings of fact by estoppel or otherwise."[10] The committee similarly decided that it lacked jurisdiction to rule on Judge Claiborne's motions to declare Rule XI unconstitutional,[11] to dismiss the articles of impeachment for failure to state an impeachable offense,[12] and to designate the standard of proof in the impeachment trial as proof beyond a reasonable doubt.[13] The committee referred these motions to the full Senate for disposition.[14]

---

[6] As the rule had initially been proposed, a committee could possibly have included recommendations on the disposition of the impeachment charges in its report to the Senate. See S. Res. 242, 73rd Cong., 2d Sess. (1934). However, the rule was amended in the Judiciary Committee to ensure "that no committee under the amended resolution would attempt to make a recommendation." 78 Cong. Rec. 9927 (1934) (Sen. Ashurst).

[7] See Report of the Senate Impeachment Trial Committee: Hearings Before the Senate Impeachment Trial Comm., 99th Cong., 2d Sess., Pt. 1, at 32-33 (1986) (letter to parties) [hereinafter cited as Senate Hearing Report].

[8] Id. at 110, 297-310, 389-93.

[9] Id. at 486-91, 689-92.

The committee received documentary evidence and heard testimony during seven days of hearings beginning on September 15, 1986. Over that period the House called three witnesses and the respondent called sixteen witnesses, including himself. All witnesses were subject to examination and cross-examination by counsel for the House and for the respondent. Following the conclusion of the testimony on September 23, 1986, the committee reported to the Senate a certified transcript of its proceedings.[15] Both parties filed post-evidentiary briefs with the Senate following the completion of the committee's proceedings.[16]

---

[10] Id. at 108 (Sen. Mathias), 145-46, 169-70.

[11] Id. at 112-14, 240.

[12] Id. at 112-14, 244.

[13] Id. at 112-14, 274.

[14] See S. Rep. No. 511, 99th Cong., 2d Sess. 3 (1986).

On October 7, 1986, the Senate convened as a court of impeachment to begin Judge Claiborne's impeachment trial. In accordance with Rule XI, the Presiding Officer ruled that the testimonial and documentary evidence that the committee had reported to the Senate would be considered as having been received and taken before the Senate. The Senate heard argument on Judge Claiborne's motion to declare Senate Impeachment Rule XI unconstitutional, one of the motions that the committee had referred to the Senate. The Senate also heard argument on a related motion and application by Judge Claiborne asking the Senate to subpoena 58 witnesses for testimony in open Senate.[17] Then, after determining to postpone decision on the motions until after final arguments, the Senate heard both parties' final arguments on the articles of impeachment. On October 8, after deliberation, the Senate determined by a vote of 61-32 not to hear any witnesses in open Senate. Deliberation on the articles of impeachment, based on the evidentiary record reported by the committee, is expected to continue on the morning of October 9, 1986.

---

[15] Id. at 1, certifying Senate Hearing Report, supra note 7.

[16] 132 Cong. Rec. S14561-75 (daily ed. Oct. 2, 1986).

[17] Id., S14584-86.

ARGUMENT

I.

THE PREMATURITY OF PLAINTIFF'S CLAIM BARS HIS ENTITLEMENT TO INTERIM RELIEF

Plaintiff's request for preliminary injunctive relief should be denied because the prematurity of his claim renders him unable to satisfy the standards for granting immediate relief. Evaluation of an application for interim injunctive relief requires a balancing of plaintiff's interim injury against the harm to defendants resulting from issuance of an injunction. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Plaintiff fails the standard of "irreparable injury" because at this point his injury remains purely speculative. The ripeness requirement prevents premature adjudication by withholding judicial intervention until a "decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). "It has long been this Court's 'considered practice not to decide abstract, hypothetical, or contingent questions....'" United Public Workers v. Mitchell, 330 U.S. 75, 90 n.22 (1947) (quoting Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945)).

Plaintiff's asserted injury will remain "contingent" until the Senate votes whether to convict him on any of the articles of impeachment. Only if two-thirds of the Senators present vote to convict plaintiff of "high crimes and misdemeanors" will the effects of the Senate's proceedings against Judge Claiborne be "felt in a concrete way." Abbott Laboratories, supra, 387 U.S. at 148. It is hardly disputable that disposition of the pending articles of impeachment will have a "more conclusive, definite, or substantial" impact on plaintiff. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154 n.4 (1951) (Frankfurter, J., concurring). Accordingly, plaintiff's concrete injury depends upon the occurrence of a contingency, before which the issue remains speculative.[18] Prior to the Senate's final action, there is no Article III case or controversy over which this Court may exercise jurisdiction.

This jurisdictional bar to the present adjudication of plaintiff's complaint imposed by Article III's case or controversy requirement is complemented by a significant prudential obstacle.[19] "'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary....'" Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)). Adherence to the doctrine of avoiding unnecessary constitutional adjudication is particularly important in a case such as this one, which presents a potentially far-reaching issue regarding the constitutional autonomy of a coordinate branch. Courts assiduously "exercise self-restraint in the utilization of our power to negative the actions of the other branches," in recognition that "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).[20] An opinion in anticipation of possible future adverse action against the plaintiff would be advisory and unnecessary and should be avoided as a matter of both jurisdiction and the prudent exercise of judicial power.

---

[18] Cf. Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (dispute over President's authority to terminate treaty without Senate approval not ripe because "Congress has taken no official action.... [W]e do not know whether there ever will be an actual confrontation....").

---

[19] See Martin Tractor Co. v. FEC, 627 F.2d 375, 379 (D.C. Cir.) (ripeness is aspect of both Article III case or controversy and prudential doctrine to guide "the court's inherent discretion when declaratory or injunctive relief is sought"), cert. denied sub nom. National Chamber Alliance for Politics v. FEC, 449 U.S. 954 (1980).

[20] Among the purposes underlying the Supreme Court's practice of avoiding unnecessary constitutional adjudication is "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

II.

THE COURT SHOULD NOT ENJOIN THE DELIBERATIONS OF A COEQUAL BRANCH

Plaintiff's lack of entitlement to injunctive relief under traditional equity principles is confirmed by the weighty separation of powers implications of plaintiff's request for equitable relief. Plaintiff's application is for nothing less than an injunction restraining the continuation of proceedings on the floor of the Senate. No litigant in the Nation's history under the Constitution has ever been awarded a court order instructing Members of a House of Congress what business they may conduct on the Floor of their Chamber or in what manner such activity may be pursued.

The Supreme Court has specifically addressed the possibility of an impeached officer's seeking judicial intervention to restrain the proceedings against him, and the Court's rhetorical treatment of such a prospect vividly conveys the impediment under the separation of powers. In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867), the State of Mississippi sought an injunction restraining President Andrew Johnson from executing a statute on the ground that it was unconstitutional. The Court held that the Constitution barred such relief against the political branches: "The

Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." Id. at 500 (emphasis added). The Court continued by addressing the possibility that, if the Court issued an injunction, the President's compliance with the injunction could lead to his impeachment. The Court asked,

> And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

Id. at 501.

In Doe v. McMillan, 412 U.S. 306 (1973), then-Justice Rehnquist relied on Mississippi v. Johnson in explaining the separation of powers bar to judicial restraint of the operation of the legislative branch. Rejecting an attempt to enjoin a congressional committee from distributing a committee report, he observed,

> I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executive Branches. [citing cases] But the prospect of the District Court's enjoining a committee of Congress, which, in the legisla-

> tive scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution.

Id. at 343-44 (Rehnquist, J., concurring and dissenting).[21] Plaintiff's request is even less supportable. He seeks to restrain the Senate, not a committee of Congress. He seeks an injunction against debate on the floor of the Senate, not against distribution of a written report. He seeks an injunction to control in advance the exercise of authority conferred upon the Senate by the Constitution, not undertaken pursuant to statute.

The standards for granting equitable relief are especially restrictive when the constitutional powers of a coordinate branch are at issue: "[W]hen requested immediate injunctive relief deeply intrudes into the core concerns of the executive branch," the D.C. Circuit has held, "the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed." Adams v. Vance, 570 F.2d 950, 954-55 (D.C. Cir. 1977) (vacating injunction directing Secretary of State to take action with serious

---

21/ Accord id. at 338 (Blackmun, J., concurring and dissenting) ("Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents ... reveal[s] a lack of confidence in our political processes and in the ability of Congress to police its own members.").

diplomatic consequences).[22/] Plaintiff cannot satisfy this especially difficult burden for equitable intervention because injunctive relief would violate two principles restricting the equity jurisdiction of federal courts. First, plaintiff seeks an injunction restraining the continuation of proceedings relating to his removal from public office. It has long been the rule that federal courts of equity lack jurisdiction to enjoin proceedings concerning the removal of public officers. See White v. Berry, 171 U.S. 366 (1898); In re Sawyer, 124 U.S. 200 (1888). Indeed, the Supreme Court has specifically extended this rule to bar interference with state impeachment proceedings challenged under claims of constitutional violations. Walton v. House of Representatives, 265 U.S. 487 (1924). In Baker v. Carr, 369 U.S. 186, 231 (1962), the Court recognized this "traditional limit upon equity jurisdiction."

Second, plaintiff's attempt to secure an injunction restraining the Senate from proceeding to consider and to vote upon the articles of impeachment violates the broad principle that forbids courts from blocking the consideration of public issues through legislative processes. This Circuit

---

[22/] Cf. Bergh v. Washington, 535 F.2d 505, 507 (9th Cir.) ("When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases."), cert. denied, 429 U.S. 921 (1976).

held fifty years ago that courts "cannot enjoin legislative debate." *Hearst v. Black*, 87 F.2d 68, 72 (D.C. Cir. 1936). The court relied upon Justice Field's observation that "'the application to enjoin the passage of any resolution ... is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity.'" *Id.* (*quoting* *Alpers v. San Francisco*, 32 F. 503, 506 (C.C.N.D. Cal. 1887) (sitting as a Circuit Justice)).[23]

This Court recently rejected a request very similar to plaintiff's. In 1981, following Senator Harrison Williams' criminal conviction in the Abscam investigation, Senator Williams brought an action for declaratory and injunctive relief challenging the procedures by which the Senate was considering a resolution to expel him from the Senate, pursuant to its textually committed authority to discipline and expel its Members under Article I, section 5, clause 2 of the Constitution. Williams v. Bush, C.A. No. 81-2839 (D.D.C.). Senator Williams sought a temporary restraining order enjoining Members of the Senate from proceeding to consideration on the floor of a resolution to expel him, maintaining that the procedures that had been used violated due process.

---

[23] *Accord* *Pauling v. Eastland*, 288 F.2d 126, 128 (D.C. Cir.) (Prettyman, C.J.) ("a court cannot interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries"), *cert. denied*, 364 U.S. 900 (1960); *Trimble v. Johnston*, 173 F. Supp. 651, 653 (D.D.C. 1959) ("the judicial branch of the Government may not control or direct the legislative or executive departments. Thus, the Federal courts may not issue an injunction ... against the Congress"); *cf.* *Ranjel v. Lansing*, 417 F.2d 321 (6th Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 980 (1970) (reversing grant of injunction restraining city from holding referendum challenged on equal protection grounds and ordering district court to allow election to proceed); *Mulkey v. Reitman*, 64 Cal.2d 529, 535, 413 P.2d 825, 829 (Cal. Sup. Ct. 1966) (rejecting constitutional challenge to keep initiative measure off state ballot, because "it would be more appropriate to pass on those questions after the election ... than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls...."), *aff'd on other grounds*, 387 U.S. 369 (1967).

This Court denied the application, stating, "As far as the Court is aware, there has never been an instance in our history where the Federal Courts have presumed to tell a body of Congress, in the middle of its deliberations, how it should deliberate; and this Court does not intend to do it." Transcript of Hearing on Motion for Temporary Restraining Order, Nov. 27, 1981, at 28 (per Gesell, J.). Without gainsaying the "profound effect on the Senator" that the expulsion proceedings could have, id. at 27, the court held that the application was "premature," that the likelihood of success on the merits was "non-existent," and that "the public interest requires that the Court not intervene," id. at 28. The court subsequently dismissed Senator Williams' action for lack of ripeness, because "[p]laintiff is asking this Court to impose a prior restraint upon Senate consideration of an expulsion resolution."[24]

III

THIS ACTION IS BARRED BY THE SPEECH OR DEBATE CLAUSE

Even if ripe, this action would be barred by the Speech or Debate Clause of the Constitution, Article I, section 6, clause 1, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." "[T]he legislative privilege will be read broadly to effectuate its purposes," United States v. Johnson, 383 U.S. 169, 180 (1966), which are "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions," Powell v. McCormack, supra, 395 U.S. at 505.[25]

---

[24] Memorandum, Feb. 3, 1982, at 2 (per Oberdorfer, J.). Although Senator Williams' suit had the additional impediment that the Senate had not yet ruled on his procedural requests, the court also relied on the fact that the effects of any procedural decision had not "been 'felt in a concrete, way....' Cf. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-9 (1967)." Id.

[25] The Court has established that the Speech or Debate Clause applies in civil actions, because "[p]rivate civil actions also may be used to delay and disrupt the legislative function.... [L]egislative independence is imperiled." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

"The heart of the Clause is speech or debate in either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Plaintiff's prayer is, literally, for an injunction against speech and debate on the floor of the Senate.[26] His action must consequently fail, because "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate clause is an absolute bar to interference." Eastland, supra, 421 U.S. at 503 (quoting Doe v. McMillan, supra, 412 U.S. at 314). The Court has delineated the Clause's scope as encompassing matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel, supra, 408 U.S. at 625 (emphasis added). The Constitution undisputably "places" the power to deliberate and vote on the removal of impeached officers "within the jurisdiction" of the Senate. Accordingly, just as this Court ruled that the Speech or Debate Clause bars an injunctive action against the Senate's exercise of its constitutional authority to expel its Members, Williams v. Bush, supra, Memorandum at 2-3, the Clause likewise proscribes the use of judicial power to delay or to disrupt the Senate's deliberations on the articles of impeachment.

---

[26] The Supreme Court has established that Members' "act of voting" constitutes "Speech or Debate" within the meaning of the Clause. Gravel, supra, 408 U.S. at 617; United States v. Brewster, 408 U.S. 501, 515-16 & n.10 (1972); Powell v. McCormack, supra, 395 U.S. at 502, 506; Kilbourn v. Thompson, 103 U.S. 168, 201, 204 (1881).

The conclusion that the Speech or Debate Clause bars plaintiff's attempt to secure injunctive relief in advance of Senate action is confirmed by the Supreme Court's decision in Powell v. McCormack. Representative Powell had sued Members and employees of the House of Representatives to challenge his exclusion and sought an injunction requiring them to perform certain duties discharged on behalf of all congressmen. The Court concluded that the purposes of the Speech or Debate Clause were "fully protected if legislators are relieved of the burden of defending themselves," 395 U.S. at 505, and affirmed the dismissal of the action against the Members, allowing it to be maintained against only the House employees, id. at 506, 550. Here, however, plaintiff has brought suit, before the Senate has acted, against the Senate, its President, and its elected Leadership. In his complaint, plaintiff seeks an injunction enjoining "any further proceedings in the Impeachment trial of Plaintiff." Complaint at 8. Under the Supreme Court's opinion in Powell, the Speech or Debate Clause bars plaintiff's action against the President of the Senate and its Leaders. The reasoning of Powell applies equally to the Senate as a body. Thus, under Powell there is no defendant against whom the relief sought in this action could be granted consistently with the Constitution.[27]

IV.

THE SENATE'S EXERCISE OF ITS POWER TO TRY IMPEACHMENTS IS NOT REVIEWABLE

Plaintiff also has no likelihood of succeeding on the merits of his claim because the Senate's exercise of its impeachment authority is not reviewable. Article I, section 3, clause 6 of the Constitution provides that "[t]he Senate shall have the sole Power to try all Impeachments." That Clause constitutes a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, supra, 369 U.S. at 217. The only federal court that has ever been asked to review the Senate's exercise of its "sole Power to try all Impeachments" held that "the word 'sole' was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." Ritter v. United States, 84

---

[27] Additionally, there is a serious question whether the Senate is a suable entity.

Ct.Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). After carefully examining the available historical evidence and legal commentary, the court flatly concluded "that no court can review the impeachment proceedings and set them aside. ... In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final." Id. at 298, 300.

The court's conclusion that the Senate's exercise of the power of trying impeachments is not reviewable is strongly supported by the development of the impeachment provision at the Constitutional Convention. Initially, the Framers had given the Supreme Court the power to try impeachments. See 2 M. Farrand, The Records of the Federal Convention of 1787, at 185-86 (rev. ed. 1966). However, after extended debate the Convention transferred the forum for impeachment trials from the courts to the Senate, because in Governeur Morris' words, "no other tribunal than the Senate could be trusted." Id. at 551. Alexander Hamilton explained that, as a representative body, only the Senate could be expected to "possess the degree of credit and authority" that might be necessary to dispose of impeachments initiated by the elective House of Representatives. The Federalist No. 65, at 427 (B. Wright ed. 1961).

The second reason for the Framers' determination that the Senate, not the Supreme Court, should try impeachments related to the courts' obligation to conduct criminal proceedings. The Framers intended the impeachment process as an independent mechanism from the criminal process and feared a sacrifice of that independence if the same branch had responsibility for both proceedings. See 2 Farrand 500 (Morris). As Hamilton stated, "[B]y making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial." The Federalist No. 65, at 428.

The Framers' deliberate substitution of the Senate for the courts as the "sole" trier of impeachments strongly undercuts the claim that a conviction on impeachment charges may be reviewed in the courts. As the court of claims concluded, "[W]hile there was some suggestion ... [at the Convention] that the Senate might abuse its power, there was no intimation by anyone that the impeachment proceedings might be reviewed or set aside by the courts." Ritter, supra, 84 Ct.Cl. at 298. Rather than grafting judicial review on the Senate's exercise of its power, the Framers adopted safeguards within the Senate's trial mechanism, by requiring that Senators sitting as a court of impeachment "be on Oath or Affirmation" and that "no Person shall be convicted without the Concurrence of two-thirds of the Members present." Art. I, sec. 3, cl. 6.

The fact that the plaintiff challenges the procedures that the Senate has been using in his impeachment proceeding, as well as the constitutional substance of the charges against him, does not alter the conclusion that his complaint is nonjusticiable. The Constitution commits to "each House" the power to "determine the Rules of its Proceedings." Art. I, sec. 5, cl. 2. Pursuant to that authority, the Senate has adopted a body of rules, including the use of committees to gather evidence, to govern its conduct of impeachment trials. In conjunction with the Impeachment Trial clause, the Rules clause commits to the sole discretion of the Senate the adoption of rules for conducting impeachment trials. As the Supreme Court held with regard to the rules for determining the existence of a quorum in the Houses of Congress,

> The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.

United States v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added).

V.

THE SENATE'S USE OF A COMMITTEE TO COMPILE AN EVIDENTIARY RECORD IS CONSTITUTIONAL

If a court were free to review the Senate's exercise of its constitutional authority to try the impeachment of Judge Claiborne, the complaint would fail to state a meritorious claim. The core of Judge Claiborne's constitutional objection to the Senate's proceedings against him is that the Senate appointed a committee, pursuant to Impeachment Rule XI, to compile and report to the Senate an evidentiary record. Contrary to Judge Claiborne's contention, the Senate's use of a committee does not contravene the constitutional requirement that the Senate "try" impeachments.

The requirement that conviction on impeachment be by "trial" was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426 (A. Hamilton). The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted). However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trial. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." Id. at 428. Justice Story similarly characterized the Senate, acting as a court of impeachment, as a tribunal "confined, as little as possible, to strict forms." J. Story, Commentaries on the Constitution, § 765, at 532 (3d ed. 1858).[30/]

The Senate's appointment of a committee to compile an evidentiary record for use at trial is a reasonable and prudent exercise of the Senate's responsibility to try impeachments. The sole function and action of the committee that convened under Rule XI was to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." In the proceeding before the committee, Judge Claiborne had a full opportunity with the assistance of counsel and the subpoena power of the Senate to develop a record to present to the full Senate. Judge Claiborne thoroughly availed himself of that opportunity by calling sixteen witnesses, who testified for a total of six of the seven days that the committee heard

---

[30/] Justice Story noted "that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments; the rigid manner, in which the discretion of judges is limited, and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents; and the adherence to technical principles, which, perhaps, distinguishes this branch of the law, more than any other, are all ill adapted to the trial of political offenses, in the broad course of impeachments." Id.

testimony. See Senate Hearing Report, supra note 7. Rule XI explicitly preserves "the right of the Senate to determine competency, relevancy, and materiality." Thus, the Senate "delegate[d] to a committee the tedious task of taking the evidence.... The trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." 78 Cong. Rec. 9929 (1934) (Sen. Norris). The committee was not empowered to make, and it made no, recommendations to the Senate about the disposition of the articles of impeachment.[31] In conformity with the Constitution, the Senate remains the sole trier of fact and the sole judge of the law.

The rule specifically reserves the Senate's prerogative to hear directly the testimony of any and all witnesses that it desires, by providing that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." Judge Claiborne requested that the Senate avail itself of both options, by moving for a full duplicate evidentiary proceeding on the floor of the Senate and by applying for subpoenas for numerous witnesses to be examined on the floor.[32] In denying the motions after extended deliberation, the full Senate, not the committee, exercised its duty to "try" Judge Claiborne's impeachment. The Senate's regulation of the conduct of the trial before it is a reasonable exercise of its "sole Power to try all Impeachments" and raises no constitutional problems.

---

[31] See 132 Cong. Rec. S11673 (daily ed. Aug. 14, 1986) (Sen. Dole); S. Rep. No. 511, 99th Cong., 2d Sess. 1 (1986) ("Rule XI does not authorize the Committee to make recommendations to the Senate, and our report contains none").

Although the trial of Judge Claiborne is the first use of Senate Impeachment Rule XI,[33] ample historical support for the procedure exists in the impeachment practices of the British Parliament, from which the Framers borrowed much of the framework for the impeachment mechanism in the Constitution.[34] As under the Constitution, in Britain the lower House, the House of Commons, preferred articles of impeachment, which were tried by the upper House, the House of Lords. While serving as the President of the Senate, Thomas Jefferson summarized for the use of the Senate the

---

[32] See 132 Cong. Rec. S14575-78, S14584-86 (daily ed. Oct. 2, 1986).

[33] The Senate has previously used a committee to collect evidence in the exercise of its constitutional authority to discipline and expel its Members. See, e.g., S. Rep. No. 187, 97th Cong., 1st Sess. (1981) (report of Senate Committee on Ethics reporting resolution to expel Senator Harrison Williams). The propriety of the Senate's performing this constitutional function with the assistance of a committee to hear evidence was established by the Supreme Court in Barry v. Cunningham, 279 U.S. 597, 613-14 (1929).

[34] Hamilton described the British system as "[t]he model from which the idea of this institution has been borrowed." The Federalist No. 65, at 427.

House of Lords' impeachment trial procedures: "The practice is to swear the witnesses in open House, and then examine them there; *or a committee may be named*, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand." *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 277, 98th Cong., 2d Sess., § 614, at 296 (1985) (emphasis added).[35]

Analogously, the Constitution confers on the Supreme Court "original Jurisdiction" to try "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." Art. III, sec. 2, cl. 2. The Court exercises that authority by appointing masters to compile an evidentiary record for the Court's disposition. See, e.g., South Carolina v. Regan, 104 S.Ct. 2148 (1984); Illinois v. Missouri, 384 U.S. 924 (1966). In rejecting the claim that a district court had used an "auditor" in violation of the right to trial by jury, the Court stated, "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." Ex Parte Peterson, 253 U.S. 300, 312 (1920). The Court quoted Chief Justice Marshall: "[A]uditors ... do not decree, but prepare materials on which a decree may be made." Id. at 313 (quoting Field v. Holland, 10 U.S. (6 Cranch) 8, 21 (1810)). Similarly here, a Senate committee has "prepared materials" for the use of the entire Senate in trying Judge Claiborne's impeachment. The Senate's use of a committee for this limited purpose implicates no constitutional problem because it is the Senate that will make the "decree."[36]

---

[35] Historical records reflect several instances in which the House of Lords used a committee to hear witnesses for the House's use in the conduct of an impeachment trial. *See, e.g.*, 2 T. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 1101 (1816) (in 1620 House of Lords "appointed a select Committee of themselves, to take Examination of witnesses" in trial of Sir Francis Bacon); *id.* at 1116 (House of Lords appointed committee to examine witnesses in trial of Dr. Field, Bishop of Landaff, in same year); *id.* at 1122-24 (in 1621 House of Lords examined witnesses in three committees in trial of Sir Giles Mompesson); 3 H.L. Jour. 350, 352-61, 365(1624) (in 1624 depositions taken by committees of House of Lords read to House as evidence of impeachment changes against Lionel Cranfield); *see* E. Foster, *The House of Lords, 1603-1649: Structure, Procedure, and The Nature of its Business* 153-61 (1983); N. Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 528-32 (1975).

---

[36] Senator Sutherland had relied on courts' use of masters in explaining his proposed forerunner to Rule XI: "I see no reason why the Senate may not take testimony as testimony is taken by a court of equity, for example, by reference, in the case of a court of equity, to a master, and in the case of the Senate by reference to a special committee or to a standing committee." 49 Cong. Rec. 698 (1912).

CONCLUSION

Plaintiff's application for a temporary restraining order should be denied.

Respectfully submitted,

Michael Davidson*
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Defendants

Dated: October 8, 1986

*Pursuant to 2 U.S.C. § 288l(b).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE,

Plaintiff,

v.

UNITED STATES SENATE, and
George Bush, its President,
Strom Thurmond, President Pro
Tempore, Robert Dole, Majority
Leader, and Robert C. Byrd,
Minority Leader,

Defendants.

Civil Action No. 86-2780

CERTIFICATE OF SERVICE

I, Morgan Frankel, hereby certify that on October 8, 1986 a copy of the Memorandum of Defendants in Opposition to Application for a Temporary Restraining Order and a proposed order were served by hand on counsel for Judge Harry Claiborne:

Oscar B. Goodman, Esq.
Goodman, Terry, Stein & Quintana
520 South Fourth Street
Las Vegas, Nevada 89101-6593

Morgan J. Frankel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. CLAIBORNE,

Plaintiff,

v.

UNITED STATES SENATE, and
George Bush, its President,
Strom Thurmond, President Pro
Tempore, Robert Dole, Majority
Leader, and Robert C. Byrd,
Minority Leader,

Defendants.

Civil Action No. 86-2780

ORDER

On consideration of plaintiff's motion for a temporary restraining order, and the opposition of defendants to that motion,

IT IS ORDERED, this __ day of October, 1986, that the motion for a temporary restraining order is denied.

United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5622 September Term, 1986

Harry E. Claiborne,
Appellant

C.A. No. 86-02780

v.

United States Senate,
Appellee

United States Court of Appeals
For the District of Columbia Circuit

FILED OCT 9 1986

GEORGE A. FISHER
CLERK

BEFORE: Wald, Chief Judge;
Edwards and Starr, Circuit Judges

ORDER

Upon consideration of appellant's Emergency Motion for Summary Reversal and Injunctive Relief and the opposition thereto, it is

ORDERED by the court that the motion for injunctive relief be denied. Appellant has not demonstrated the requisite likelihood of success on the merits necessary to justify the issuance of an injunction. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 & n.1 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is

FURTHER ORDERED by the court that the motion for summary reversal be denied. Summary disposition is appropriate only when the merits of the case are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect our decision." *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985). The appellant has not met that "heavy burden." *Id*, at 793.

Per Curiam

true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit
By: Deputy Clerk

Exhibit 3

No. A-275

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY E. CLAIBORNE,

Petitioner

v.

UNITED STATES SENATE, and George Bush, its President, Strom Thurmond, President Pro Tempore, Robert Dole, Majority Leader, and Robert C. Byrd, Minority Leader,

Respondents.

OPPOSITION TO APPLICATION FOR INJUNCTION

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Respondents, the United States Senate, its President, and its elected Leadership file this opposition to petitioner's application for an injunction restraining the Senate from completing deliberation and voting on the articles of impeachment currently pending before the Senate against petitioner, a United States District Judge of the District of Nevada. Petitioner initiated this action in the United States District Court for the District of Columbia on the afternoon of October 8, 1986, seeking a temporary restraining order against the Senate's deliberation on, and disposition of, the articles of impeachment pending against him. Judge Claiborne is challenging the constitutionality of the Senate's decision to receive the evidence upon which it will determine whether he should be convicted on the impeachment articles through a committee appointed solely for that purpose.

The district court (per Harold Greene, J.) denied Judge Claiborne's application for a temporary restraining order and dismissed his complaint. In remarks delivered from the bench, the district court held that adjudication of the complaint, which names the Senate, its President, and its elected Leadership as defendants, is barred by the Speech or Debate Clause of the Constitution, Art. I, sec. 6, cl. 1. The court further held that the complaint should be dismissed because the Constitution confers upon the Senate the "sole Power to try all Impeachments." U.S. Const., art. I, sec. 3, cl. 6. A transcript of the district court's bench ruling and a copy of the order are attached to this oppposition.

In the evening of October 8 Judge Claiborne appealed to the United States Court of Appeals for the District of Columbia Circuit from the denial of the temporary restraining order application and filed an emergency motion for summary reversal and injunctive relief. After adversary briefing, the court denied Judge Claiborne's motion (per Wald, C.J., Edwards, Starr, JJ.). The court held that Judge Claiborne "has not demonstrated the requisite likelihood of success on the merits necessary to justify the issuance of an injunction." The court further held that Judge Claiborne had failed to meet the "heavy burden" of a request for summary reversal. A copy of the court's _per curiam_ Order is attached to this opposition.

The Senate convened as a court of impeachment to deliberate on the articles of impeachment at 10:00 this morning. Following the conclusion of its deliberations, the Senate is scheduled to proceed to a vote on the articles between 2:00 and 3:00 this afternoon. Judge Claiborne requests that this Court intervene to restrain the Senate from voting whether to convict him on the articles of impeachment.

Petitioner's request for an injunction should be denied for the threshold reason that Judge Claiborne's complaint is unripe for adjudication until the Senate has concluded the impeachment trial. Until the Senate has convicted or acquitted Judge Claiborne on the articles of impeachment, his assertion of harm remains speculative. Judge Claiborne cannot satisfy the Court's standard for the granting of a mandatory injunction before review, which requires that a litigant's "right to relief must be indisputably clear." Communist Party of Indiana v. Whitcomb, 409 U.S. 1235 (1972) (in-chambers opinion) (Rehnquist, Circuit Justice). Judge Claiborne's purely speculative injury is outweighed by the fundamental right of a coordinate branch of the Government to perform its constitutional responsibilities free from interference. Petitioner's lack of entitlement to injunctive relief is further demonstrated by his nonexistent likelihood of success on the merits. Judge Claiborne's complaint is independently barred by (1) the general principles of separation of powers, (2) the specific prohibition of the Speech or Debate Clause of the Constitution, and (3) the political question doctrine. Finally, if the merits of this controversy were ever adjudicated, the Senate's procedures in trying Judge Claiborne fully satisfy the requirements of the Constitution.

STATEMENT OF THE CASE

On July 22, 1986 the House of Representatives unanimously adopted House Resolution 461 impeaching District Judge Harry E. Claiborne of high crimes and misdemeanors. House Resolution 461 sets out four articles of impeachment alleging that Judge Claiborne willfully filed false income tax returns for 1979 (Article I) and 1980 (Article II) and that he has been convicted for those criminal offenses (Article III).[1] The fourth Article alleges that Judge Claiborne's willful and knowing falsification of his 1979 and 1980 tax returns "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts." After the House exhibited the articles of impeachment to the Senate,[2] the Senate convened as a court of impeachment, and an oath was administered to all Senators pursuant to the Constitution.[3] Then, the Senate adopted Senate Resolution 480, which provided for the issuance of a summons commanding Judge Claiborne to file an answer to the impeachment articles, and Senate Resolution 481, which directed the Presiding Officer of the Senate to appoint a committee of twelve Senators, pursuant to Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, to receive and to report evidence to the Senate with respect to the articles of impeachment against Judge Claiborne.[4]

---

[1] Upon a jury trial Judge Claiborne was convicted of two counts of 26 U.S.C. § 7206(1) (1982), which provides that

> Any person who ... [w]illfully makes and subscribes any [tax] return ... which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The conviction was upheld on appeal, United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 106 S.Ct. 1636 (1986), and Judge Claiborne was sentenced to two years' imprisonment for each violation, to be served concurrently, and a fine of $5,000 for each violation. He began serving his sentence on May 16, 1986 at Maxwell Air Force Base in Montgomery, Alabama.

[2] 132 Cong. Rec. S10535 (daily ed. Aug. 6, 1986).

[3] 132 Cong. Rec. S11672 (daily ed. Aug. 14, 1986). Article I, section 3, clause 6 provides that "[w]hen sitting for th[e] Purpose" of trying impeachments, the Senate "shall be on Oath or Affirmation."

Impeachment Rule XI authorizes the appointment of a Senate committee "to receive evidence and take testimony" and to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before [the] committee." Rule XI provides that the committee's report of its evidentiary proceedings "shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate." The Rule further stipulates that "nothing ... shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate."

The Senate adopted Impeachment Rule XI in 1935 in order to facilitate its conduct of impeachment proceedings without unduly sacrificing its ability to continue to perform its legislative duties. The use of a Senate committee to collect evidence for presentation to the Senate had first been proposed in 1912 by Senator (later Justice) Sutherland, in the midst of the Senate's twenty-two-day trial of Judge Robert W. Archbald. Senator Sutherland proposed that the Senate's impeachment rules be amended to provide "that in all impeachment cases hereafter instituted, except when the President or

---

[4] See S. Res. 479, 99th Cong., 2d Sess. (1986)(amending Senate's impeachment rules).

Vice President of the United States, a member of the Cabinet, or a member of the Supreme Court of the United States is impeached, the testimony may be taken by the Judiciary Committee and together with findings of fact reported to the Senate for its consideration and judgment." 49 Cong. Rec. 698 (1912). Senator Sutherland explained that, in the course of the Archbald trial,

> time has been taken away from the important business of the Senate. Many of the Senators could not be present to hear the testimony, and of necessity they are obliged to read it before they can act. The same result, it seems to me, would be obtained by referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate. Of course, the findings of fact which might be presented by the Judiciary Committee would only be advisory, and not binding on the Senate.

Id.

Although Senator Sutherland's resolution was not acted upon, his proposal resurfaced following the ordeal of another impeachment trial in 1933. As Senator Ashurst subsequently described, the ten-day trial of District Judge Harold Louderback had prompted "not a dozen, not 20, but at least 40 Senators [to] urge[] that the Senate Committee on the Judiciary give its attention to the question whether or not a committee appointed by the Presiding Officer could take the testimony in impeachment trials." 80 Cong. Rec. 3425 (1936). The Senate adopted Rule XI to permit the use of a committee to compile an evidentiary record for the Senate in order

> to avoid what always takes place in an impeachment trial before the Senate. There are times when there is not a quorum of the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evi-

> dence is being taken. Senators have to read the evidence in the RECORD in order to know what it is.

78 Cong. Rec. 9929 (1934)(Sen. Norris).[5]

In its consideration of Rule XI, the Senate discussed the constitutionality of the receipt of evidence by a committee. Responding to an assertion that an impeached officer is "entitled to a full trial in every respect before the entire Senate if he should ask for it," id., 9928 (Sen. Borah), Majority Leader Robinson stated, "I should think the Senate would be the judge of whether it wished to hear the witnesses in person, or to take their testimony by deposition, or in some other way.... Mr. President, in my judgment, the taking of testimony by a committee constitutes part of the trial by the Senate," id. In Senator Norris's view, the Senate would "delegate to a committee the tedious task of taking the evidence," but "[t]he trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." Id., 9929.

As adopted, Rule XI authorizes the appointment of a committee to report to the Senate only "a certified copy of the transcript of the proceedings and testimony had and given before such committee." Id., 9927. The Senate determined not to permit a committee receiving impeachment evidence to make any recommendations to the Senate on the ultimate impeachment question, but merely to report to the Senate a certified record of evidentiary proceedings, "leaving it to the Senate and remitting to the Senate its power and right and sole authority to determine the questions of relevancy, materiality, and the weight of the evidence. The committee would make no recommendations." Id. (Sen. Ashurst).[6]

---

[5] While it was considering the proposal, the Senate was also aware of a potential impeachment trial arising from a pending House investigation of District Judge Halsted L. Ritter. As it developed, although Judge Ritter was impeached following the adoption of Rule XI, the Senate chose not to use the newly adopted Rule during the Ritter trial.

The appointment of a committee to collect evidence with respect to Judge Claiborne's impeachment generated the first use of Rule XI. Following the committee's organizational meeting on August 15, 1986, the House managers and counsel for the plaintiff were invited to file any necessary pretrial motions before the committee began hearing testimony.[7] Both parties filed a number of motions, which were argued before the committee on September 10 and September 15, 1986. The committee granted a motion by the House to accept into evidence certain evidence from Judge Claiborne's criminal trials[8] and granted in part a House motion to exclude evidence of prosecutorial or judicial misconduct.[9] The committee referred to the full Senate House motions for summary disposition of the third article of impeachment, which relies solely upon the fact of the plaintiff's criminal conviction, and for application of collateral estoppel to the factual issues alleged in the first two articles of impeachment. The committee ruled that it lacked jurisdiction "to grant judgment on any article of impeachment, and we have no authority to make any findings of fact by estoppel or otherwise."[10] The committee similarly decided that it lacked jurisdiction to rule on Judge Claiborne's motions to declare Rule XI unconstitutional,[11] to dismiss the articles of impeachment for failure to state an impeachable offense,[12] and to designate the standard of proof in the impeachment trial as proof beyond a reasonable doubt.[13] The committee referred these motions to the full Senate for disposition.[14]

---

[6] As the rule had initially been proposed, a committee could possibly have included recommendations on the disposition of the impeachment charges in its report to the Senate. See S. Res. 242, 73rd Cong., 2d Sess. (1934). However, the rule was amended in the Judiciary Committee to ensure "that no committee under the amended resolution would attempt to make a recommendation." 78 Cong. Rec. 9927 (1934) (Sen. Ashurst).

[7] See Report of the Senate Impeachment Trial Committee: Hearings Before the Senate Impeachment Trial Comm., 99th Cong., 2d Sess., Pt. 1, at 32-33 (1986) (letter to parties) [hereinafter cited as Senate Hearing Report].

[8] Id. at 110, 297-310, 389-93.

[9] Id. at 486-91, 689-92.

The committee received documentary evidence and heard testimony during seven days of hearings beginning on September 15, 1986. Over that period the House called three witnesses and the respondent called sixteen witnesses, including himself. All witnesses were subject to examination and cross-examination by counsel for the House and for the respondent. Following the conclusion of the testimony on September 23, 1986, the committee reported to the Senate a certified transcript of its proceedings.[15] Both parties filed post-evidentiary briefs with the Senate following the completion of the committee's proceedings.[16]

On October 7, 1986, the Senate convened as a court of impeachment to begin Judge Claiborne's impeachment trial. In accordance with Rule XI, the Presiding Officer ruled that the testimonial and documentary evidence that the committee had reported to the Senate would be considered as having been received and taken before the Senate. The Senate heard argument on Judge Claiborne's motion to declare Senate Impeachment Rule XI unconstitutional, one of the motions that the committee had referred to the Senate. The Senate also heard argument on a related motion and application by Judge Claiborne asking the Senate to subpoena 58 witnesses for testimony in open Senate.[17/] Then, after determining to postpone decision on the motions until after final arguments, the Senate heard both parties' final arguments on the articles of impeachment. In the early afternoon of October 8, after deliberation, the Senate determined by a vote of 61-32 not to hear any witnesses in open Senate. Following that determination, Judge Claiborne filed his complaint and request for a temporary restraining order enjoining the Senate from proceeding to conclude its deliberations and to vote on the articles of impeachment on October 9.

---

[10] _Id._ at 108 (Sen. Mathias), 145-46, 169-70.

[11] _Id._ at 112-14, 240.

[12] _Id._ at 112-14, 244.

[13] _Id._ at 112-14, 274.

[14] _See_ S. Rep. No. 511, 99th Cong., 2d Sess. 3 (1986).

[15] _Id._ at 1, _certifying Senate Hearing Report_, _supra_ note 7.

[16] 132 Cong. Rec. S14561-75 (daily ed. Oct. 2, 1986).

ARGUMENT

I.

THE PREMATURITY OF PETITIONER'S CLAIM BARS HIS ENTITLEMENT TO INJUNCTIVE RELIEF

Petitioner's request for injunctive relief should be denied because the prematurity of his claim renders him unable to satisfy the standards for grant of an injunction prior to review. Evaluation of an application for emergency injunctive relief requires a balancing of the applicant's interim injury against the harm to the respondents resulting from issuance of an injunction. Because at this point Judge Claiborne's injury remains purely speculative, Judge

---

[17/] *Id.*, S14584-86.

Claiborne cannot demonstrate that "irreparable injury will result in the event that a stay is denied." Barthuli v. Board of Trustees, 434 U.S. 1337, 1338-39 (1977) (in chambers opinion) (Rehnquist, Circuit Justice). "It has long been this Court's 'considered practice not to decide abstract, hypothetical, or contingent questions....'" United Public Workers v. Mitchell, 330 U.S. 75, 90 n.22 (1947) (quoting Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945)). To achieve that end, the ripeness requirement prevents premature adjudication by withholding judicial intervention until a "decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

Judge Claiborne's asserted injury will remain "contingent" until the Senate votes whether to convict him on any of the articles of impeachment. Only if two-thirds of the Senators present vote to convict petitioner of "high crimes and misdemeanors" will the effects of the Senate's proceedings against Judge Claiborne be "felt in a concrete way." Abbott Laboratories, supra, 387 U.S. at 148. It is hardly disputable that disposition of the pending articles of impeachment will have a "more conclusive, definite, or substantial" impact on the petitioner. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154 n.4 (1951) (Frankfurter, J., concurring). Accordingly, petitioner's concrete injury depends upon the occurrence of a contingency, before which the issue remains speculative.[18] Prior to the

---

[18] Cf. Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (dispute over President's authority to terminate treaty without Senate approval not ripe because "Congress has taken no official action.... [W]e do not know whether there ever will be an actual confrontation....").

Senate's final action, there is no justiciable Article III case or controversy.

This jurisdictional bar to the present adjudication of Judge Claiborne's complaint imposed by Article III's case or controversy requirement is complemented by a significant prudential obstacle.[19/] "'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary....'" Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)). Adherence to the doctrine of avoiding unnecessary constitutional adjudication is particularly important in a case such as this one, which presents a potentially far-reaching issue regarding the constitutional autonomy of a coordinate branch. This Court has assiduously "exercise[d] self-restraint in the utilization of our power to negative the actions of the other branches," in recognition that "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).[20/] An opinion in anticipation of possible future adverse action against the petitioner would be

---

19/ See Martin Tractor Co. v. FEC, 627 F.2d 375, 379 (D.C. Cir.) (ripeness is aspect of both Article III case or controversy and prudential doctrine to guide "the court's inherent discretion when declaratory or injunctive relief is sought"), cert. denied sub nom. National Chamber Alliance for Politics v. FEC, 449 U.S. 954 (1980).

20/ Among the purposes underlying the Court's practice of avoiding unnecessary constitutional adjudication is "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

advisory and unnecessary and should be avoided as a matter of both jurisdiction and the prudent exercise of judicial power.

II.

THE COURT SHOULD NOT ENJOIN THE DELIBERATIONS OF A COEQUAL BRANCH

Judge Claiborne's lack of entitlement to injunctive relief under traditional equity principles is confirmed by the weighty separation of powers implications of petitioner's request for equitable relief. Petitioner's application is for nothing less than an injunction restraining the continuation of proceedings on the floor of the Senate. No litigant in the Nation's history under the Constitution has ever been awarded a court order instructing Members of a House of Congress what business they may conduct on the Floor of their Chamber or in what manner such activity may be pursued.

This Court has specifically addressed the possibility of an impeached officer's seeking judicial intervention to restrain the proceedings against him, and the Court's rhetorical treatment of such a prospect vividly conveys the impediment under the separation of powers. In _Mississippi v. Johnson_, 71 U.S. (4 Wall.) 475 (1867), the State of Mississippi sought an injunction restraining President Andrew Johnson from executing a statute on the ground that it was unconstitutional. The Court held that the Constitution barred such relief against the political branches: "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, _when performed_, are, in proper cases, subject to its cognizance." _Id._ at 500 (emphasis added). The Court continued by addressing the possibility that, if the Court issued an injunction, the President's compliance with the injunction could lead to his impeachment. The Court asked,

> And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

Id. at 501.

In Doe v. McMillan, 412 U.S. 306 (1973), then-Associate Justice Rehnquist relied on Mississippi v. Johnson in explaining the separation of powers bar to judicial restraint of the operation of the legislative branch. Rejecting an attempt to enjoin a congressional committee from distributing a committee report, Justice Rehnquist observed,

> I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executive Branches. [citing cases] But the prospect of the District Court's enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution.

Id. at 343-44 (Rehnquist, J., concurring and dissenting).[21] Petitioner's request is even less supportable. He seeks to restrain the Senate, not a committee of Congress. He seeks an injunction against debate and voting on the floor of the Senate, not against distribution of a written report. He seeks an injunction to control in advance the exercise of authority conferred upon the Senate by the Constitution, not undertaken pursuant to statute.

---

[21] Accord id. at 338 (Blackmun, J., concurring and dissenting) ("Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents ... reveal[s] a lack of confidence in our political processes and in the ability of Congress to police its own members.").

The standards for granting equitable relief are especially restrictive when the constitutional powers of a coordinate branch are at issue: "[W]hen requested immediate injunctive relief deeply intrudes into the core concerns of the executive branch," the District of Columbia Circuit has held, "the party seeking this kind of relief would have to make an extraordinarily strong showing to succeed." *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1977) (vacating injunction directing Secretary of State to take action with serious diplomatic consequences).[22] Petitioner cannot satisfy this especially difficult burden for equitable intervention because injunctive relief would violate two principles restricting the equity jurisdiction of federal courts. First, petitioner seeks an injunction restraining the continuation of proceedings relating to his removal from public office. It has long been the rule that federal courts of equity lack jurisdiction to enjoin proceedings concerning the removal of public officers. *See White v. Berry*, 171 U.S. 366 (1898); *In re Sawyer*, 124 U.S. 200 (1888). Indeed, the Court has specifically extended this rule to bar interference with state impeachment proceedings challenged under claims of constitutional violations. *Walton v. House of Representatives*, 265 U.S. 487 (1924). In *Baker v. Carr*, 369 U.S. 186,

---

[22] *Cf. Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.) ("When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases."), *cert. denied*, 429 U.S. 921 (1976).

231 (1962), the Court recognized this "traditional limit upon equity jurisdiction."

Second, petitioner's attempt to secure an injunction restraining the Senate from proceeding to consider and to vote upon the articles of impeachment violates the broad principle that forbids courts from blocking the consideration of public issues through legislative processes. The District of Columbia Circuit held fifty years ago that courts "cannot enjoin legislative debate." *Hearst v. Black*, 87 F.2d 68, 72 (D.C. Cir. 1936). The court relied upon Justice Field's observation that "'the application to enjoin the passage of any resolution ... is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity.'" *Id.* *quoting* *Alpers v. San Francisco*, 32 F. 503, 506 (C.C.N.D. Cal. 1887) (Field, Circuit Justice)).23/

Several years ago the District Court for the District of Columbia soundly rejected a request very similar to petitioner's. Following Senator Harrison Williams' criminal

---

23/ *Accord* *Pauling v. Eastland*, 288 F.2d 126, 128 (D.C. Cir.) (Prettyman, C.J.) ("a court cannot interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries"), *cert. denied*, 364 U.S. 900 (1960); *Trimble v. Johnston*, 173 F. Supp. 651, 653 (D.D.C. 1959) ("the judicial branch of the Government may not control or direct the legislative or executive departments. Thus, the Federal courts may not issue an injunction ... against the Congress"); *cf.* *Ranjel v. Lansing*, 417 F.2d 321 (6th Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 980 (1970) (reversing grant of injunction restraining city from holding referendum challenged on equal protection grounds and ordering district court to allow election to proceed); *Mulkey v. Reitman*, 64 Cal.2d 529, 535, 413 P.2d 825, 829 (Cal. Sup. Ct. 1966) (rejecting constitutional challenge to keep initiative measure off state ballot, because "it would be more appropriate to pass on those questions after the election ... than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls...."), *aff'd on other grounds*, 387 U.S. 369 (1967).

conviction in the Abscam investigation, Senator Williams brought an action for declaratory and injunctive relief challenging the procedures by which the Senate was considering a resolution to expel him from the Senate, pursuant to its textually committed authority to discipline and expel its Members under Article I, section 5, clause 2 of the Constitution. Williams v. Bush, C.A. No. 81-2839 (D.D.C.). Senator Williams sought a temporary restraining order enjoining Members of the Senate from proceeding to consideration on the floor of a resolution to expel him, maintaining that the procedures that had been used violated due process.

The court denied the application, stating, "As far as the Court is aware, there has never been an instance in our history where the Federal Courts have presumed to tell a body of Congress, in the middle of its deliberations, how it should deliberate; and this Court does not intend to do it." Transcript of Hearing on Motion for Temporary Restraining Order, Nov. 27, 1981, at 28 (per Gesell, J.). Without gainsaying the "profound effect on the Senator" that the expulsion proceedings could have, id. at 27, the court held that the application was "premature," that the likelihood of success on the merits was "non-existent," and that "the public interest requires that the Court not intervene," id. at 28. The court subsequently dismissed Senator Williams' action for lack of ripeness, because "[p]laintiff is asking this Court to impose a prior restraint upon Senate consideration of an expulsion resolution."[24/]

[24/] Memorandum, Feb. 3, 1982, at 2 (per Oberdorfer, J.). Although Senator Williams' suit had the additional impediment that the Senate had not yet ruled on his procedural requests, the court also relied on the fact that, as in this case, the effects of any procedural decision had not "been 'felt in a concrete, way....' Cf. Abbott Laboratories v. Gardner, 387 (footnote continued)

III

THIS ACTION IS BARRED BY THE SPEECH OR DEBATE CLAUSE

Even if ripe, this action would be barred by the Speech or Debate Clause of the Constitution, Article I, section 6, clause 1, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." "[T]he legislative privilege will be read broadly to effectuate its purposes," United States v. Johnson, 383 U.S. 169, 180 (1966), which are "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions," Powell v. McCormack, supra, 395 U.S. at 505.[25]

"The heart of the Clause is speech or debate in either House." Gravel v. United States, 408 U.S. 606, 625 (1972). Petitioner's application is, literally, for an injunction against speech and debate on the floor of the Senate.[26] His request must consequently fail, because "once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate clause is an absolute bar to interference." Eastland, supra, 421 U.S. at 503 (quoting Doe v. McMillan, supra, 412 U.S. at 314). The Court has delineated the Clause's scope as encompassing matters that

---

U.S. 136, 148-9 (1967)." Id.

[25] The Court has established that the Speech or Debate Clause applies in civil actions, because "[p]rivate civil actions also may be used to delay and disrupt the legislative function.... [L]egislative independence is imperiled." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

[26] The Court has established that Members' "act of voting" constitutes "Speech or Debate" within the meaning of the Clause. Gravel, supra, 408 U.S. at 617; United States v. Brewster, 408 U.S. 501, 515-16 & n.10 (1972); Powell v. McCormack, supra, 395 U.S. at 502, 506; Kilbourn v. Thompson, 103 U.S. 168, 201, 204 (1881).

are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel, supra, 408 U.S. at 625 (emphasis added). The Constitution undisputably "places" the power to deliberate and vote on the removal of impeached officers "within the jurisdiction" of the Senate. Accordingly, as the district court ruled, the Speech or Debate Clause proscribes the use of judicial power to delay or to disrupt the Senate's deliberations on the articles of impeachment.

The district court's conclusion that the Speech or Debate Clause bars plaintiff's attempt to secure injunctive relief in advance of Senate action is confirmed by this Court's decision in Powell v. McCormack. Representative Powell had sued both Members and employees of the House of Representatives to challenge his exclusion and sought an injunction requiring them to perform certain duties discharged on behalf of all congressmen. The Court concluded that the purposes of the Speech or Debate Clause were "fully protected if legislators are relieved of the burden of defending themselves," 395 U.S. at 505, and affirmed the dismissal of the action against the Members, allowing it to be maintained against only the House employees, id. at 506, 550. Here, however, petitioner has brought suit not against subordinate employees of the Senate, but against the Senate itself, its President, and its elected Leadership. In his complaint, Judge Claiborne seeks an injunction enjoining "any further proceedings in the Impeachment trial of Plaintiff." Complaint at 8. Under the Court's decision in Powell, the

Speech or Debate Clause bars petitioner's action against the President of the Senate and its Leaders. Further, the reasoning of Powell applies equally to bar petitioner's attempt to restrain the entire Senate as a body.[27] Thus, under Powell relief cannot be granted consistently with the Constitution against any defendant named in this action.

IV.

THE SENATE'S EXERCISE OF ITS POWER TO TRY IMPEACHMENTS IS NOT REVIEWABLE

Petitioner also has no likelihood of succeeding on the merits of his claim because, as the district court held, the Senate's exercise of its impeachment authority is not reviewable. Article I, section 3, clause 6 of the Constitution provides that "[t]he Senate shall have the sole Power to try all Impeachments." That Clause constitutes a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, supra, 369 U.S. at 217. The only federal court that has ever been asked to review the Senate's exercise of its "sole Power to try all Impeachments" held that "the word 'sole' was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." Ritter v. United States, 84 Ct.Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). After carefully examining the available historical evidence and legal commentary, the court flatly concluded "that no court can review the impeachment proceedings and set them aside. ... In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final." Id. at 298, 300.

---

[27] Additionally, there is a serious question whether the Senate is a suable entity.

The court's conclusion that the Senate's exercise of the power of trying impeachments is not reviewable is strongly supported by the development of the impeachment provision at the Constitutional Convention. Initially, the Framers had given the Supreme Court the power to try impeachments. See 2 M. Farrand, The Records of the Federal Convention of 1787, at 185-86 (rev. ed. 1966). However, after extended debate the Convention transferred the forum for impeachment trials from the courts to the Senate, because in Governeur Morris' words, "no other tribunal than the Senate could be trusted." Id. at 551. Alexander Hamilton explained that, as a representative body, only the Senate could be expected to "possess the degree of credit and authority" that might be necessary to dispose of impeachments initiated by the elective House of Representatives. The Federalist No. 65, at 427 (B. Wright ed. 1961).

The second reason for the Framers' determination that the Senate, not the Supreme Court, should try impeachments related to the courts' obligation to conduct criminal proceedings. The Framers intended the impeachment process as an independent mechanism from the criminal process and feared a sacrifice of that independence if the same branch had responsibility for both proceedings. See 2 Farrand 500 (Morris). As Hamilton stated, "[B]y making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial." The Federalist No. 65, at 428.

The Framers' deliberate substitution of the Senate for the courts as the "sole" trier of impeachments strongly undercuts the claim that a conviction on impeachment charges may be reviewed in the courts. As the court of claims concluded, "[W]hile there was some suggestion ... [at the Convention] that the Senate might abuse its power, there was no intimation by anyone that the impeachment proceedings might be reviewed or set aside by the courts." Ritter, supra, 84 Ct.Cl. at 298. Rather than grafting judicial review on the Senate's exercise of its power, the Framers adopted safeguards within the Senate's trial mechanism, by requiring that Senators sitting as a court of impeachment "be on Oath or Affirmation" and that "no Person shall be convicted without the Concurrence of two-thirds of the Members present." Art. I, sec. 3, cl. 6.

The fact that the petitioner challenges the procedures that the Senate has been using in his impeachment proceeding, as well as the constitutional substance of the charges against him, does not alter the conclusion that his complaint is nonjusticiable. The Constitution commits to "each House" the power to "determine the Rules of its Proceedings." Art. I, sec. 5, cl. 2. Pursuant to that authority, the Senate has adopted a body of rules, including the use of committees to gather evidence, to govern its conduct of impeachment trials. In conjunction with the Impeachment Trial clause, the Rules clause commits to the sole discretion of the Senate the adoption of rules for conducting impeachment trials. As this Court held with regard to the rules for determining the existence of a quorum in the Houses of Congress,

> The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and

> there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. *But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.*

United States v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added).

V.

THE SENATE'S USE OF A COMMITTEE TO COMPILE AN EVIDENTIARY RECORD IS CONSTITUTIONAL

If a court were free to review the Senate's exercise of its constitutional authority to try the impeachment of Judge Claiborne, the complaint would fail to state a meritorious claim. The core of Judge Claiborne's constitutional objection to the Senate's proceedings against him is that the Senate declined to hear witnesses in open Senate and instead appointed a committee, pursuant to Impeachment Rule XI, to compile and report to the Senate an evidentiary record. Contrary to Judge Claiborne's contention, the Senate's use of a committee does not contravene the constitutional requirement that the Senate "try" impeachments.

The requirement that conviction on impeachment be by "trial" was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." *The Federalist No. 65*, at 426 (A. Hamilton). The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." *Id.* at 427 (emphasis omitted). However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trial. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." Id. at 428. Justice Story similarly characterized the Senate, acting as a court of impeachment, as a tribunal "confined, as little as possible, to strict forms." J. Story, Commentaries on the Constitution, § 765, at 532 (3d ed. 1858).[28]

The Senate's appointment of a committee to compile an evidentiary record for use at trial is a reasonable and prudent exercise of the Senate's responsibility to try impeachments. The sole function and action of the committee that convened under Rule XI was to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." In the proceeding before the committee, Judge Claiborne had a full opportunity with the assistance of counsel and the subpoena power of the Senate to develop a record to present to the full Senate. Judge Claiborne thoroughly availed himself of that opportunity by calling sixteen witnesses, who testified for a total of six of the seven days that the committee heard testimony. See Senate Hearing Report, supra note 7. Rule XI explicitly preserves "the right of the Senate to determine competency, relevancy, and materiality." Thus, the Senate "delegate[d] to a committee the tedious task of taking the evidence.... The trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." 78 Cong. Rec. 9929 (1934) (Sen. Norris). The committee was not empowered to make, and it made no, recommendations to the Senate about the disposition of the articles of impeachment.[29/] In conformity with the Constitution, the Senate remains the sole trier of fact and the sole judge of the law.

---

[28] Justice Story noted

> that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments; the rigid manner, in which the discretion of judges is limited, and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents; and the adherence to technical principles, which, perhaps, distinguishes this branch of the law, more than any other, are all ill adapted to the trial of political offenses, in the broad course of impeachments.

Id.

The rule specifically reserves the Senate's prerogative to hear directly the testimony of any and all witnesses that it desires, by providing that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." Judge Claiborne requested that the Senate avail itself of both options, by moving for a full duplicate evidentiary proceeding on the floor of the Senate and by applying for subpoenas for numerous witnesses to be examined on the floor.[30/] In denying the motions after extended deliberation, the full Senate, not the committee, exercised its duty to "try" Judge Claiborne's impeachment. The Senate's regulation of the conduct of the trial before it is a reasonable exercise of

---

[29/] See 132 Cong. Rec. S11673 (daily ed. Aug. 14, 1986) (Sen. Dole); S. Rep. No. 511, 99th Cong., 2d Sess. 1 (1986) ("Rule XI does not authorize the Committee to make recommendations to the Senate, and our report contains none").

[30/] See 132 Cong. Rec. S14575-78, S14584-86 (daily ed. Oct. 2, 1986).

its "sole Power to try all Impeachments" and raises no constitutional problems.

Although the trial of Judge Claiborne is the first use of Senate Impeachment Rule XI,[31] ample historical support for the procedure exists in the impeachment practices of the British Parliament, from which the Framers borrowed much of the framework for the impeachment mechanism in the Constitution.[32] As under the Constitution, in Britain the lower House, the House of Commons, preferred articles of impeachment, which were tried by the upper House, the House of Lords. While serving as the President of the Senate, Thomas Jefferson summarized for the use of the Senate the House of Lords' impeachment trial procedures: "The practice is to swear the witnesses in open House, and then examine them there; *or a committee may be named*, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand." *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. No. 277, 98th Cong., 2d Sess., § 614, at 296 (1985) (emphasis added).[33]

---

[31] The Senate has previously used a committee to collect evidence in the exercise of its constitutional authority to discipline and expel its Members. *See, e.g.*, S. Rep. No. 187, 97th Cong., 1st Sess. (1981) (report of Senate Committee on Ethics reporting resolution to expel Senator Harrison Williams). The propriety of the Senate's performing this constitutional function with the assistance of a committee to hear evidence was established by the Supreme Court in *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613-14 (1929).

[32] Hamilton described the British system as "[t]he model from which the idea of this institution has been borrowed." *The Federalist No. 65*, at 427.

[33] Historical records reflect several instances in which the House of Lords used a committee to hear witnesses for the House's use in the conduct of an impeachment trial. *See, e.g.*, 2 T. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 1101 (1816) (in (footnote continued)

Analogously, the Constitution confers on the Supreme Court "original Jurisdiction" to try "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." Art. III, sec. 2, cl. 2. The Court exercises that authority by appointing masters to compile an evidentiary record for the Court's disposition. See, e.g., South Carolina v. Regan, 104 S.Ct. 2148 (1984); Illinois v. Missouri, 384 U.S. 924 (1966). In rejecting the claim that a district court had used an "auditor" in violation of the right to trial by jury, the Court stated, "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." Ex Parte Peterson, 253 U.S. 300, 312 (1920). The Court quoted Chief Justice Marshall: "[A]uditors ... do not decree, but prepare materials on which a decree may be made." Id. at 313 (quoting Field v. Holland, 10 U.S. (6 Cranch) 8, 21 (1810)). Similarly here, a Senate committee has "prepared materials" for the use of the entire Senate in trying Judge Claiborne's impeachment. The Senate's use of a committee for

---

1620 House of Lords "appointed a select Committee of themselves, to take Examination of witnesses" in trial of Sir Francis Bacon); id. at 1116 (House of Lords appointed committee to examine witnesses in trial of Dr. Field, Bishop of Landaff, in same year); id. at 1122-24 (in 1621 House of Lords examined witnesses in three committees in trial of Sir Giles Mompesson); 3 H.L. Jour. 350, 352-61, 365 (1624) (in 1624 depositions taken by committees of House of Lords read to House as evidence of impeachment charges against Lionel Cranfield); see E. Foster, The House of Lords, 1603-1649: Structure, Procedure, and The Nature of its Business 153-61 (1983). A scholarly article has examined these historical precedents to refute the contrary claim of Professor Raoul Berger, which was relied upon by petitioner below. See N. Williams, The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 528-32 (1975).

this limited purpose implicates no constitutional problem because it is the Senate that will make the "decree."[34]

CONCLUSION

Petitioner's application for a stay should be denied.

Respectfully submitted,

Michael Davidson
Senate Legal Counsel

Ken U. Benjamin, Jr.
Deputy Senate Legal Counsel

Morgan J. Frankel
Assistant Senate Legal Counsel

642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Counsel for Respondents

Dated: October 9, 1986

---

[34] Senator Sutherland had relied on courts' use of masters in explaining his proposed forerunner to Rule XI: "I see no reason why the Senate may not take testimony as testimony is taken by a court of equity, for example, by reference, in the case of a court of equity, to a master, and in the case of the Senate by reference to a special committee or to a standing committee." 49 Cong. Rec. 698 (1912).

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served by personal delivery with three copies of the Opposition to Application for Injunction on October 9, 1986:

Oscar B. Goodman, Esq.
Goodman, Terry, Stein & Quintana
520 South Fourth Street
Las Vegas, Nevada 89101-6593

Morgan J. Frankel

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

AREA CODE 202
479-3011

October 16, 1986

OCT 20 REC'D

Oscar B. Goodman, Esquire
530 South Fourth Street
Las Vegas, NV 89101

Howard W. Cannon, Esquire
499 South Capitol Street, S.W.
Suite 400
Washington, D.C. 20003

Re: Harry E. Claiborne v. United States Senate, et al., A-275

Gentlemen:

This letter supersedes our letter of October 9, 1986.

The application for a temporary restraining order and other relief pending appeal in the above-entitled case has been presented to the Chief Justice, who has endorsed thereon the following:

"10/9/86. Denied
WHR"

Per your request the application in the above-entitled case was presented to Justice Marshall, who has endorsed thereon the following:

"Denied
Thurgood Marshall
10/9/86"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson
Chief Deputy Clerk

vjr

cc: Michael Davidson, Esq.
Senate Legal Counsel
642 Hart Senate Office Bldg.
Washington, D.C. 20510

UNANIMOUS-CONSENT AGREEMENT

Mr. **Dole**. Mr. President, I am now in a position to propound a unanimous-consent request. I ask unanimous consent that at 10 a.m. on Thursday, October 9, 1986, the Senate resume the impeachment proceedings against Judge Harry E. Claiborne and the time between 10 a.m. and 3 p.m. be equally divided. I further ask unanimous consent that at no earlier than 2 p.m. and no later than 3 p.m. the Senate proceed to vote on each of the following questions: How vote you, Senator, guilty or not guilty on articles I through IV? And those votes would occur separately.

The **Presiding Officer**. Is there objection? Without objection, it is so ordered.

ORDERS FOR THURSDAY, OCTOBER 9, 1986

RECESS UNTIL 9 A.M.

Mr. **Dole**. Mr. President, I ask unanimous consent that when the Senate completes its business today it stand in recess until the hour of 9 a.m. on Thursday, October 9, 1986.

The **Presiding Officer**. Without objection, it is so ordered.

STATEMENTS REGARDING RETIRING SENATORS

Mr. **Dole**. Mr. President, following the recognition of the two leaders under the standing order of 10 minutes each, I ask unanimous consent that the time remaining until the hour of 10 a.m. be used by Senators to make statements concerning our six retiring colleagues.

The **Presiding Officer**. Without objection, it is so ordered.

RESUME IMPEACHMENT PROCEEDINGS

Mr. **Dole**. Mr. President, at 10 a.m. by previous agreement, the Senate will resume the impeachment proceedings. The time between 10 a.m. and 3 p.m. will be divided between the majority and minority leaders or their designees. The vote will come no earlier than 2 p.m. and no later than 3 p.m. At that time, the Senate will proceed to vote on each of the following questions: "How vote you, Senator, guilty or not guilty?" That will be on articles I through IV. The votes will occur separately.

Following the impeachment proceedings, the Senate could be asked to consider any executive or legislative items cleared for action.

[Congressional Record, October 9, 1986—S 15759]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

COURT OF IMPEACHMENT

The **Presiding Officer** (Mr. Laxalt). Under the previous order, the hour of 10 a.m. having arrived, the Senate will now proceed in closed session to deliberate upon the Articles of Impeachment. The time is equally divided in the usual form.

[At 10 a.m. the doors of the Chamber were closed. The proceedings of the Senate were held in closed session until 2:51 p.m. at which time, the following occurred.]

OPEN SESSION

[At 2:51 p.m. the doors of the Chamber were opened and the Senate resumed proceedings in open session.]

[During the closed session there was a call of the roll, Quorum No. 16.]

The managers of the House of Representatives, together with special counsel, were seated at the table assigned to them in the well of the Senate to the right of the Chair.

The respondent and his counsel were seated at the table assigned to them in the well of the Senate to the left of the Chair.

Mr. DOLE. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOLE. I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

AUTHORITY FOR RECORD STATEMENTS UNTIL WEDNESDAY, OCTOBER 15, 1986

Mr. DOLE. I ask unanimous consent that all Senators may be permitted to insert their statements or their reasons for their votes through Wednesday.

The PRESIDENT pro tempore. Is there objection?

Mr. DOLE. That is through Wednesday of next week.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. DOLE. I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

Mr. DOLE addressed the Chair.

Mr. DOLE. Mr. President, I ask that further proceedings under the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered. The Sergeant at Arms will make a proclamation.

The Sergeant at Arms, Ernest E. Garcia, made proclamation as follows:

All persons are commanded to keep silent on pain of imprisonment while the House of Representatives is exhibiting to the Senate of the United States Articles of Impeachment against Judge Harry E. Claiborne.

ARTICLE I

The PRESIDENT pro tempore. The clerk will read the first Article of Impeachment.

The legislative clerk read as follows:

ARTICLE I

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $80,227.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

VOTE ON ARTICLE I

The President pro tempore. The Chair reminds the Senate that each Senator, when his or her name is called, will stand and vote "guilty" or "not guilty."

Senators, how say you? Is the respondent, Harry E. Claiborne, guilty or not guilty?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. Stevens (when his name was called). Present.

Mr. Simpson. I announce that the Senator from Utah [Mr. Garn] and the Senator from Idaho [Mr. Symms] are necessarily absent.

The result was announced—guilty 87, not guilty 10, as follows:

[Rollcall Vote No. 335]

[Subject: Article I—Court of Impeachment—Judge H.E. Claiborne]

GUILTY—87

Abdnor
Andrews
Armstrong
Baucus
Bentsen
Biden
Boren
Boschwitz
Bradley
Broyhill
Bumpers
Burdick
Byrd
Chafee
Chiles
Cochran
Cohen
Cranston
D'Amato
Danforth
DeConcini
Denton
Dixon
Dodd
Dole
Domenici
Durenberger
Eagleton
Exon
Ford
Glenn
Goldwater
Gore
Gorton
Gramm
Grassley
Harkin
Hart
Hawkins
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerry
Lautenberg
Leahy
Lugar
Mathias
Matsunaga
Mattingly
McClure
McConnell
Melcher
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Proxmire
Quayle
Riegle
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Simon
Simpson
Specter
Stafford
Stennis
Thurmond
Trible
Wallop
Warner
Weicker
Wilson
Zorinsky

NOT GUILTY—10

Bingaman
Evans
Hatch
Hatfield
Hecht
Laxalt
Levin
Long
Metzenbaum
Pryor

ANSWERED "PRESENT"—1

Stevens

NOT VOTING—2

Garn
Symms

The PRESIDENT pro tempore. I would remind the gallery there will be no expressions of approval or disapproval when the result is announced.

Upon this Article of Impeachment, 87 Senators have voted guilty; 10 Senators have voted not guilty; 1 voting present.

Two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Harry E. Claiborne, is guilty as charged in this Article.

ARTICLE II

The PRESIDENT pro tempore. The clerk will now read the second Article of Impeachment.

The assistant legislative clerk read as follows:

ARTICLE II

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1981, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

VOTE ON ARTICLE II

The PRESIDENT pro tempore. I would remind the Senators when they vote they will stand and announce their decision.

Senators, how say you, is the respondent Henry E. Claiborne guilty or not guilty of this Article?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. STEVENS (when his name was called). Present.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. Garn] and the Senator from Idaho [Mr. Symms] are necessarily absent.

The result was announced—guilty 90, not guilty 7, as follows:

[Rollcall Vote No. 336]

[Subject: Article II—Court of Impeachment—Judge H.E. Claiborne]

GUILTY—90

Abdnor
Andrews
Armstrong
Baucus
Bentsen
Biden
Boren
Boschwitz
Bradley
Broyhill
Bumpers
Burdick
Byrd
Chafee
Chiles
Cochran
Cohen
Cranston
D'Amato
Danforth
DeConcini
Denton
Dixon
Dodd
Dole
Domenici
Durenberger
Eagleton
Exon
Ford
Glenn
Goldwater
Gore
Gorton
Gramm
Grassley
Harkin
Hart
Hawkins
Hecht
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerry
Lautenberg
Laxalt
Leahy
Lugar
Mathias
Matsunaga
Mattingly
McClure
McConnell
Melcher
Metzenbaum
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Proxmire
Quayle
Riegle
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Simon
Simpson
Specter
Stafford
Stennis
Thurmond
Trible
Wallop
Warner
Weicker
Wilson
Zorinsky

NOT GUILTY—7

Bingaman
Evans
Hatch
Hatfield
Levin
Long
Pryor

ANSWERED "PRESENT"—1

Stevens

NOT VOTING—2

Garn
Symms

Mr. Dole. Mr. President, may we have order?

The President pro tempore. The Senate will come to order.

I admonish the galleries again that no noise of approval or disapproval is to be given to the result.

Upon this Article of Impeachment, 90 Senators have voted guilty, 7 Senators have voted not guilty, and 1 Senator voted present. Two-thirds of the Members present and having voted guilty, the Senate adjudges that the respondent, Harry E. Claiborne, is guilty as charged in this Article.

ARTICLE III

The President pro tempore. The clerk will now read the third Article of Impeachment.

The legislative clerk read as follows:

ARTICLE III

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

On August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury making and subscribing a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of title 26, United States Code.

Therefore, a judgment of conviction was entered against Judge Harry E. Claiborne for each of the violations of section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5000 for each violation.

VOTE ON ARTICLE III

The PRESIDENT pro tempore. I will remind Senators when they vote they will stand and vote "guilty" or "not guilty" or "present," as the case may be.

Senators, how say you? Is the respondent, Harry E. Claiborne guilty or not guilty, or do you vote "present"?

The clerk will call the roll.

The legislative clerk called the roll.

Mr. ABDNOR (when his name was called). Present.

Mr. ANDREWS (when his name was called). Present.

Mr. ARMSTRONG (when his name was called). Present.

Mr. BIDEN (when his name was called). Present.

Mr. BURDICK (when his name was called). Present.

Mr. BYRD (when his name was called). Present.

Mr. COHEN (when his name was called). Present.

Mr. CRANSTON (when his name was called). Present.

Mr. D'AMATO (when his name was called). Present.

Mr. DOLE (when his name was called). Present.

Mr. DOMENICI (when his name was called). Present.

Mr. FORD (when his name was called). Present.

Mr. GORE (when his name was called). Present.

Mr. GORTON (when his name was called). Present.

Mr. GRAMM (when his name was called). Present.

Mr. HART (when his name was called). Present.

Mr. HEFLIN (when his name was called). Present.

Mr. HUMPHREY (when his name was called). Present.

Mr. INOUYE (when his name was called). Present.

Mr. KERRY (when his name was called). Present.

Mr. MATHIAS (when his name was called). Present.

Mr. MATTINGLY (when his name was called). Present.

Mr. MCCONNELL (when his name was called). Present.

Mr. MELCHER (when his name was called). Present.

Mr. MOYNIHAN (when his name was called). Present.

Mr. MURKOWSKI (when his name was called). Present.

Mr. NUNN (when his name was called). Present.

Mr. PACKWOOD (when his name was called). Present.

Mr. RUDMAN (when his name was called). Present.

Mr. SARBANES (when his name was called). Present.

Mr. SIMPSON (when his name was called). Present.

Mr. STEVENS (when his name was called). Present.

Mr. THURMOND (when his name was called). Present.

Mr. Wallop (when his name was called). Present.

Mr. Weicker (when his name was called). Present.

Mr. Simpson. I announce that the Senator from Utah [Mr. Garn] and the Senator from Idaho [Mr. Symms] are necessarily absent.

The result was announced—guilty 46, not guilty 17, as follows:

[Rollcall Vote No. 337]

[Subject: Article III—Court of Impeachment—Judge H.E. Claiborne]

GUILTY—46

Baucus
Bentsen
Bingaman
Boren
Boschwitz
Bradley
Broyhill
Bumpers
Cochran
Danforth
DeConcini
Denton
Dixon
Durenberger
Eagleton
Exon
Glenn
Grassley
Harkin
Hatfield
Hollings
Johnston
Kassebaum
Kasten
Kennedy
Lautenberg
Leahy
Levin
Long
Lugar
Metzenbaum
Mitchell
Nickles
Pressler
Proxmire
Quayle
Riegle
Rockefeller
Roth
Sasser
Simon
Stafford
Stennis
Trible
Wilson
Zorinsky

NOT GUILTY—17

Chafee
Chiles
Dodd
Evans
Goldwater
Hatch
Hawkins
Hecht
Heinz
Helms
Laxalt
Matsunaga
McClure
Pell
Pryor
Specter
Warner

ANSWERED "PRESENT"—35.

NOT VOTING—2

Garn
Symms

The President pro tempore. I admonish the galleries that no expression of approval or disapproval is to be given when the vote is announced.

Upon this Article of Impeachment, 46 Senators have voted guilty; 17 Senators have voted not guilty; and 35 voted "present."

Less than two-thirds of the Members having voted guilty, the Senate adjudges that respondent Harry E. Claiborne is not guilty as charged in this article.

ARTICLE IV

The President pro tempore. The clerk will now read the Fourth Article of Impeachment.

The assistant legislative clerk read as follows:

Article IV

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

THE VOTE ON ARTICLE IV

The PRESIDENT pro tempore. I remind Senators that in voting, they will stand and vote "guilty," "not guilty," or "present" as the case may be.

Senators, how say you: Is the respondent, Harry E. Claiborne guilty or not guilty?

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. STEVENS (when his name was called). Present.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. Garn] and the Senator from Idaho [Mr. Symms] are necessarily absent.

The result was announced—guilty 89, not guilty, 8 as follows:

[Rollcall Vote No. 338]

[Subject: Article IV—Court of Impeachment—Judge H.E. Claiborne]

GUILTY—89

Abdnor
Andrews
Armstrong
Baucus
Bentsen
Biden
Boren
Boschwitz
Bradley
Broyhill
Bumpers
Burdick
Byrd
Chafee
Chiles
Cochran
Cohen
Cranston
D'Amato
Danforth
DeConcini
Denton
Dixon
Dodd
Dole
Domenici
Durenberger
Eagleton
Exon
Ford
Glenn
Goldwater
Gore
Gorton
Gramm
Grassley
Harkin
Hart
Hawkins
Hecht
Heflin
Heinz
Helms
Hollings
Humphrey
Inouye
Johnston
Kassebaum
Kasten
Kennedy
Kerry
Lautenberg
Leahy
Levin
Lugar
Mathias
Matsunaga
Mattingly
McClure
McConnell
Melcher
Mitchell
Moynihan
Murkowski
Nickles
Nunn
Packwood
Pell
Pressler
Proxmire
Quayle
Riegle
Rockefeller
Roth
Rudman
Sarbanes
Sasser
Simon
Simpson
Specter
Stafford
Stennis
Thurmond
Trible
Wallop
Warner
Weicker
Wilson
Zorinsky

NOT GUILTY—8

Bingaman
Evans
Hatch
Hatfield
Laxalt
Long
Metzenbaum
Pryor

NOT VOTING—2

Garn
Symms

ANSWERED "PRESENT"—1

Stevens

The President pro tempore. The Senate will be in order. I will again admonish the galleries that when the vote is announced there will be no expression of approval or disapproval.

The President pro tempore. Upon this Article of Impeachment, 89 Senators having voted guilty, 8 Senators having voted not guilty, 1 voting present, two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Harry E. Claiborne, is guilty as charged in this Article.

The Chair directs judgment to be entered in accordance with the vote of the Senate, as follows:

The Senate having tried Harry E. Claiborne, U.S. district judge for the District of Nevada, upon four Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in the first, second, and fourth Articles of Impeachment, it is, therefore, ordered and adjudged that the said Harry E. Claiborne be, and he is hereby removed from office.

Mr. Dole. Mr. President, I send an order to the desk.

The President pro tempore. The clerk will report.

The assistant legislative clerk read as follows:

> *Ordered,* That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the order and judgment of the Senate in the case of Harry E. Claiborne, and transmit a certified copy of same to each.

The President pro tempore. Without objection, the order will be entered and adjudged.

Mr. Dole. Mr. President, I move that the Senate, sitting as a court of impeachment, adjourn sine die.

[Thereupon, at 4:13 p.m., the Senate, sitting as a court of impeachment, adjourned sine die.]

[The judgment follows:]

In the Senate of the United States,

October 9 (legislative day, October 6), 1986

JUDGMENT

The Senate having tried Harry E. Claiborne, United States District Judge for the District of Nevada, upon four Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in the First, Second, and Fourth Articles of Impeachment: it is therefore,

Ordered and adjudged, That the said Harry E. Claiborne be, and he is hereby removed from office.

Attest:

Jo-Anne L. Coe

Secretary.

STATEMENTS SUBMITTED FOR THE RECORD BY MEMBERS OF THE UNITED STATES SENATE REGARDING THE IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE

AUTHORIZATION FOR FILING STATEMENTS WITH RESPECT TO IMPEACHMENT TRIAL OF HARRY E. CLAIBORNE

Mr. DOLE. Mr. President, I ask unanimous consent that Senators may have until the close of business tomorrow, Thursday, October 16, to file their written statements with respect to the impeachment trial of Harry E. Claiborne.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATEMENT OF SENATOR JEFF BINGAMAN

Mr. BINGAMAN. Mr. President, I rise to explain my own votes on the four Articles of Impeachment which have been presented by the House of Representatives against Judge Harry E. Claiborne.

Let me start by putting this proceeding in context as I understand it. This is the first time in history that the U.S. Senate has been asked to try the impeachment of a public official who has already been convicted of a felony in the Federal courts and who is serving time in a Federal penitentiary for that conviction. Judge Claiborne's conviction is final in the sense that all normal appeals from the conviction have been denied.

The charges being brought against Judge Claiborne in this impeachment trial are identical to the charges upon which he was convicted by a jury in the Federal District Court of Nevada.

A threshold question which we in the Senate need to decide is "What is the Senate's proper role in this proceeding?" In most cases, the Constitution clearly contemplates that the Senate shall sit as a trier of fact to determine whether the charged individual is guilty of "high crimes and misdemeanors," and therefore should be removed from office. It is clear to me that article I: section III, clauses 6 and 7 of the Constitution, which provides that the Senate shall have the "sole power to trial impeachments," did not contemplate a situation where the person charged would have already been convicted of a felony.

Since this case presents us with Articles of Impeachment based on the same underlying facts which supported a jury conviction for a felony, I believe we are not required to once again try those facts and make an independent determination as to those facts. Clearly we have the authority to do so if we believe the criminal proceeding in the courts was so flawed as to justify it, but we are not in any way bound by the Constitution to independently once again try the same factual issues.

In this case, the Senate has chosen to use the procedure under rule 11 of the Rules of the Senate to establish a committee to take testimony and prepare a record of the case to be presented to the full Senate. I have served on that committee and believe the committee did its work in a responsible and fair manner. And in light of my own opinion that the Senate is not required to try the underlying facts in a case such as this where a previous criminal conviction on those facts has been obtained, I believe the Senate action in delegating its responsibility to a special committee was appropriate and met all constitutional requirements imposed upon the Senate.

However, if this were not a case in which factual determinations underlying the Articles of Impeachment had earlier been established in a court, I would have serious doubts about the adequacy of the hearing which we in the full Senate have given to this matter in order to carry out the Senate's responsibilities under the Constitution.

Mr. President, this brings me to a discussion of the four Articles of Impeachment. The House of Representatives has presented its case to the Senate on two distinct theories. First, they have argued that the Senate should make an independent finding that Judge Claiborne willfully and knowingly filed tax returns for the years 1979 and 1980 which he did not believe to be accurate and true and that that willful filing of false tax returns should be established by the Senate as constituting high crimes and misdemeanors justifying his removal from office. This theory is contained in Articles I, II, and IV of the Articles of Impeachment.

The second and alternative theory put forward by the House of Representatives is contained in Article III and essentially is a request that the Senate accept the judgment of conviction which was entered against Judge Claiborne for violation of section 7206(1) of title 26 of the United States Code as an adequate basis for his removal from office. As I understand this second theory, which is contained in Article III, a conviction by the Senate under this theory would not require an independent determination by the Senate as to the underlying facts supporting the conviction.

Let me discuss briefly my own view as to what has been presented under each of the two separate theories.

For the Senate to convict on Articles I, II, and IV, I believe the Senate would have to make an independent determination as to the state of mind of Judge Claiborne when he delivered information to his accountants in the spring of 1980 and 1981—for tax years 1979 and 1980—and when those returns were filed. To make that type of independent determination of his state of mind, I believe it would be essential to hear witnesses and judge the credibility of those witnesses. For the Senate to convict on Articles I, II, and IV, the Senate must conduct itself as a factfinding body and cannot delegate that responsibility to a special committee. In my opinion, putting the record of evidence presented to the committee into the possession of all Senators is not an adequate substitute for Senators hearing the witnesses present their case. At the very least, I believe it would be necessary for the Senate to permit the respondent, Judge Claiborne, to testify as a witness in response to the specific allegations of fact underlying these charges.

The Senator from Maine has argued that Judge Claiborne had a full hour to present his side of the case before the Senate and therefore any constitutional requirement has been fulfilled.

In my view, this analysis is wrong. Judge Claiborne's presentation to the full Senate was in the nature of part of a closing statement. It was a plea for the Senate to hear the witnesses in this case and the fact that he did not adequately refute specific charges and specific evidence presented against him in the proceeding before the Senate committee or presented against him in the court case is not a waiver of by him of his right to testify before the Senate and defend himself against those charges.

In short, as to Articles I, II, and IV of the Articles of Impeachment, I believe the Senate has failed to give Judge Claiborne an adequate hearing to justify a finding that he willfully and knowingly filed false tax returns for the years 1979 and 1980. It may be impractical in the closing days of a legislative session to contemplate a week or more of trial presentation to the U.S. Senate, but absent that kind of hearing, I do not believe the Senate can hold itself out as having been a "trier of fact" as we would be required to be under Articles I, II, and IV.

Article III of the Articles of Impeachment does not require the Senate to make an independent factual determination about the willfulness with which the judge acted in 1980 and 1981. This article argues that the Senate should accept the felony conviction of Judge Claiborne in the Federal courts as an adequate basis for a conviction here which then removes him from office. Mr. President, I will vote to convict on Article III because I believe this is a legally sound and logical course for the Senate to follow.

Mr. President, if we do not go forward with a conviction in this case, we have the anomaly of leaving a Federal district judge in office while he also remains in the Federal penitentiary, has been stripped of his right to vote and continues to be labeled a felon under the criminal laws of this country. To my mind, that is an unacceptable result in this particular case that has been presented.

Mr. President, one other issue needs to be addressed as part of this impeachment and that is the allegations of misconduct and abusive targeting by Federal prosecutors. Judge Claiborne's allegations in this regard are serious and it is clear from the debate which has taken place here in the Senate that many members are concerned about not only the evidence of overreaching by the Government in this case but other instances of similar overreaching. I do not believe that these allegations, even if true, would justify the Senate in failing to convict. However, I do believe that the Senate, in its oversight responsibility as part of the legislative branch of our Federal Government, should direct the Judiciary Committee to hold oversight hearings on this issue and to determine whether legislative action to deal with this problem is required.

In conclusion, Mr. President, we have not given the respondent an adequate hearing to support a conviction on Articles I, II, and IV. A vote of guilty on each of those Articles requires an independent determination as to Judge Claiborne's state of mind and in order to make that determination we need to hear testimony, not have a select few hear testimony, but actually have the Senate hear testimony. Accordingly, I will vote "no" on those three Articles. I believe a decision to remove the respondent on the basis of Article III is appropriate and I will vote to do so.

STATEMENT OF SENATOR ORRIN G. HATCH

Mr. HATCH. Mr. President, the Senate conducted earlier today a trial because the Constitution clearly distinguishes between criminal and impeachment proceedings. Article I, section 3, commits criminal processes to the judiciary and impeachments to the Congress. As a separated power, Congress had the responsibility to make an independent assessment of whether Judge Claiborne had done anything to warrant removal from office. The separation of criminal and impeachment proceedings, in my mind, precludes this body from merely deferring to the existence of a criminal conviction. We have the duty to reach our own independent conclusion about the facts which gave rise to these charges.

REASONABLE DOUBT STANDARD

Each of the four counts of impeachment asserted that this body ought to convict Judge Claiborne because he willfully filed fraudulent tax returns which caused his conviction in a court of law. In other words, the reason the Senate was asked to convict is that a court found beyond a reasonable doubt that the judge willfully underreported his income. This is the charge that the Senate reviewed. It was obligated to ask itself whether, beyond a reasonable doubt, the judge purposefully and wittingly filed a false return. I contended that if the Senate found that he did, then it had to decide that he was properly convicted in court and it had to give him the same verdict on the question of removal. On the other hand, I argued, if there remains a reasonable doubt about his intentions, then the Senate was obligated to conclude that he should not have been convicted in court and that he should not have been impeached and that he should not have been convicted by the Senate. Relying as they did on the criminal conviction, the House Articles of Impeachment required the Senate to ascertain whether, beyond a reasonable doubt, Judge Claiborne intentionally filed a false return.

THE CRIMINAL CONVICTION

Claiborne was charged and convicted under the Internal Revenue Code, 26 U.S.C. 7206(1), which reads:

> Any person who * * * willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Upon his conviction on two counts covering 1979 and 1980, Claiborne was sentenced to 2 years of imprisonment for each violation, to be served concurrently, and was fined $5,000 for each violation.

WILLFULNESS

All of the issues before the Senate today were reducible to one simple question: Did Judge Harry Claiborne willfully file a false tax return? Both Judge Claiborne and the House agreed that the 1979 and 1980 tax returns fail to report taxable income. The issue before the Nevada District Court and the Senate today was whether that underreporting was "willful."

The Supreme Court, in *United States* v. *Pomponio*, 429 U.S. 10 (1976) stated that the term "willfully" in the tax code requires more than a showing of carelessness or negligence; it requires proof of an intentional violation of a known legal duty. In *United States* v. *Bishop*, 412 U.S. 346 (1973), the Supreme Court stated:

> Degrees of negligence given rise in the tax system to civil penalties * * * The Court's consistent interpretation of the word "willfully" to require an element of mens rea implement the pervasive intent of Congress to construct penalties that separate the purposeful tax violation from the well-meaning, * * * mass of taxpayers. Id at 360-361.

The import of these cases is that willfulness is the intentional, deliberate, voluntary, or witting violation of a known legal obligation.

Certainly Judge Claiborne knew the duty to file an accurate and complete tax return. It is far from clear from the evidence presented either in trial or during the impeachment proceedings that Judge Claiborne deliberately or intentionally or wittingly or purposefully tried to escape the obligation of every taxpayer. To the contrary, there is much to indicate that Judge Claiborne's deliberate actions were an attempt to file an accurate and complete return. According to the judge and much corroborating evidence, miscommunications with accountants and mistakes by those accountants caused errors in the judge's tax returns, of which he was unaware until the criminal investigation was already underway. If the judge is correct, the voluminous evidence at most shows that he was negligent in failing to detect his accountant's errors. This, however, would not be willfulness. It would not be deliberate and witting tax evasion. It would be simple negligence, which as the Supreme Court's Bishop case stated, would be corrected by a civil proceeding, not a criminal action.

Because the pivotal issue in this case is the state of mind issue, I examined extensively the concept of willfulness. In that connection, I adopted the formulation of that concept found in the House brief. As the House brief concedes, there is no direct evidence of willfulness in this case. There is no letter from the judge to Watson or Wright instructing them to falsify income or conspiring with them to hide some other material fact. No direct evidence of willfulness is found in the records of this case in the courts or before Congress.

In the absence of direct evidence, the House was correct to note that "Willfulness may be inferred by the trier of fact from all the facts and circumstances of the attempted understatement of tax." *U.S.* v. *Conforte*, 624 F.2d 869, 875 (9th Cir. 1980). The House post-trial brief then detailed several circumstances that may indicate a willful filing of a fraudulent return. These include, for instance, a consistent pattern of underreporting, the magnitude of the error, a sudden change in accountants, and so forth. I examined the evidence of this trial in each of these categories of circumstantial proof to ascertain if they indicate, beyond a reasonable doubt, willfulness.

CIRCUMSTANTIAL WILLFULNESS EVIDENCE INSUFFICIENT

The House brief purports to show sufficient circumstantial evidence of willfulness. I examined each of these bits of circumstantial evidence of willfulness. The Senate had the duty to ask itself if this evidence leaves any reasonable doubts about Judge Claiborne's state of mind. To the extent that none of them establish beyond a reasonable doubt Judge Claiborne's willfulness, the Senate should not, in my opinion, have convicted.

The first of these is the consistent pattern of underreporting. Judge Claiborne did report fully and accurately his income in both 1979 and 1980. Let's look first at the evidence concerning the 1979 tax return. In his April 11 letter to his accountant, Mr. Wright, the judge gave an accurate accounting of his legal fee income. That letter was handwritten by Judge Claiborne and contained the full and correct amount he had earned in fees, $41,073. Wright does not remember receiving the letter, but the judge's secretary remembers delivering it, the judge saw the letter on Wright's desk when he visited Wright's office later that afternoon, Wright's employee—Ken Swanson—saw the judge's secretary in Wright's office on April 11, and the judge's tax return accurately reflects the sale of his airplane which was reported to Wright in the April 11 letter. In addition, on the final day of the Senate impeachment proceedings, an affidavit was filed by a former secretary in Mr. Wright's office attesting that she had received the letter from the judge's secretary, Judy Ahlstrom, on April 11, 1979. This enormous body of evidence that the April 11 letter was received includes verification from Wright himself in the form of his recordkeeping. He accurately notes that he received and filed the $8,000 check which accompanied the April 11 letter. The April 11 letter is a full and fair accounting of the judge's 1979 tax liability. The evidence shows that the judge fully and fairly reported his 1979 income.

Wright maintains that the judge sent him a figure of only $22,622 in legal fees. This is also naturally and believably explained. On April 11, Judge Claiborne had sent the letter to Wright disclosing his full fee income. On May 1, nearly 3 weeks later, the judge was engaged in a phone conversation with Mr. Wright. Mr. Wright was asking the judge several questions about his tax return. At one point Mr. Wright was searching for the judge's legal fee income. Wright then purported to find the amount and declared it to be $22,600. Because he had sent the accurate figure to Wright by letter a few weeks earlier, the judge naturally assumed that Wright has found the amount declared in the April 11 letter. The judge wrote that amount on his worksheet. Later Wright used that same worksheet as the judge's declaration of his income. This is a tragic mistake. It is a classic instance of miscommunication. It is not, however, a crafty plan to defraud the taxpayer.

In 1980, the judge also reported all of his income to his accountant. Judge Claiborne wrote down personally his legal fee income of $88,500 on a yellow legal pad and gave it to Watson. Charlotte Travaglia, the employee of Watson who did the work on the judge's 1980 return, testified that the judge made a full disclosure of his income. Although the House contended that the $88,000 never appears on the tax return, evidence presented by Travaglia and others, however, establishes that the only way that the 1980 return could have arrived, on an erroneous Watson theory, at a figure for long-term capital loss in the sale of his law business was by including the $88,000 as a capital gain to be offset against capital losses. It was improperly treated as a capital gain by Watson, but Judge Claiborne had fully and fairly reported his 1980 income.

On the point of whether this alleged underreporting was a consistent activity, the House made much of the fact that these errors occurred in 2 successive years. An examination of the evidence, however, offers a plausible explanation. After all, Judge Claiborne had only recently taken his position on the bench. He was still adjusting to new financial arrangements, new work schedules, new responsibilities, new demands on his time and talents. It was time of turmoil and change in his life. He was selling his residence and purchasing another. He was turning over his law firm to his former partners and liquidating his assets in that business. These drastic changes were also an important reason that he elected to switch accountants. With changes of this magnitude underway in his life, it is not wholly unexpected that miscommunications, misperceptions, and mistakes might occur in these 2 years.

Another factor contributing to these errors is Judge Claiborne's reluctance to devote precious time to his financial dealings. The evidence shows that he once left several tens of thousands of dollars in a safety deposit box where it drew no interest for months. Money was not uppermost in the judge's mind. He hired accountants to relieve him of this unsavory part of his business life. In any event, because the judge did in fact disclose his income in each of the years in question, the fact that errors might have occurred in 2 years of turmoil still has no criminal implications.

In sum, Judge Claiborne did not underreport his income—consistently or otherwise.

The next circumstantial point made by the House concerns the magnitude of the error. The $18,700 shortfall in his 1979 return was not due to any willful act on Judge Claiborne's part. He thought the income he disclosed on April 11 was part of the return. The judge did not actually review the 1979 tax return before it was filed. On May 2, 1980, he was leaving town to take an assigned case in another jurisdiction. Fearing that he might not return before the filing deadline, the judge went to Wright's office and signed a return in blank. He signed the return in blank because he was going out of town on assignment. He certainly expected that it would contain income which he had reported to his accountant in an earlier hand-written and hand-delivered letter.

Wright's testimony on this point is that he had changed his practice of allowing tax returns to be signed in blank. It is nonetheless uncontroverted that early in his career Wright had permitted tax returns to be signed in blank. Judge Claiborne had been associated with Wright for 30 years. The recent changes in practice may not have been binding on a longstanding customer like Judge Claiborne who testifies persuasively that he signed the form in blank sometime on May 2.

In 1980, Judge Claiborne reported to Watson the $88,500 in income on the now-famous "yellow sheets." Watson told the judge that the income was reflected in the schedule D form concerning capital gains because it was part of the sale of the law business. Watson pointed out that this method had been checked by the CPA who did the actual work on the judge's tax return and further checked with the IRS.

The 1980 tax return was a mess. It contained numerous blatant errors. It did not even credit Judge Claiborne with the $22,000 he had already paid in estimated taxes for that same tax year. It was filled out in pencil and had arrows drawn from one part of the return to others. If the judge had intended to defraud, he certainly would have been more cunning. If Judge Claiborne had intended to defraud, he certainly would not have filed a return full of red flags pointing to its likely deficiencies.

Another aspect of the circumstantial evidence of willfulness discussed the disclosure of summary data only. By this the House meant to suggest that Judge Claiborne withheld from Wright or Watson information that they needed to file a complete return. If Judge Claiborne did write and cause to be delivered the April 11 letter, however, he withheld nothing. He had reported all of his income to Mr. Wright. His business practices had necessarily changed in 1978 when he began his service on the bench. For this reason, he no longer had deposits mailed directly to Mr. Wright. This was because he was no longer paid by clients in the same manner. He did not manage his affairs in the same manner he had when he was managing a law business. Instead some lingering payments came sporadically from his former partners and these the judge often cashed for his living expenses or other needs. Nothing was hidden. The April 11 letter is evidence of his care to report all income.

The same is true in 1980. Judge Claiborne reported his income to Mr. Watson who in turn passed it on to Ms. Travaglia. Nothing was hidden. Nothing was withheld. There is no evidence that Judge Claiborne refused to share all relevant information with his accountants in 1979 and 1980.

The fourth aspect of circumstantial evidence of willfulness was the allegedly sudden change of accountants. Judge Claiborne had several good reasons for changing accountants. In the first place, he no longer was managing a law business. He had no need of the wide range of services provided by Wright. Moreover Wright had treated the judge coldly in some of their recent conversations. This may well have been because Mr. Wright had moved on to a different clientele after 30 years in the business. He may have wished that he was receiving more compensation for his services. The reason that Judge Claiborne and his accountant began drifting apart are not fully stated. It is clear, however, that the judge perceived that his accountant was no longer as interested in his account as he had been in the past.

Mr. Watson, on the other hand, came highly recommended by the judge's wife and had impressed the judge on the one occasion he had to observe his work. Watson was very interested in Judge Claiborne's account. He forthrightly solicited Judge Claiborne's business with the promise that he might be able to save him money on taxes in a legitimate manner. Judge Claiborne was selling his large home and Watson specifically mentioned in his letter a plan to treat that transaction favorably. In light of the distance between the judge and his former accountant, this offer must have been very attractive.

The fourth category of circumstantial evidence of willfullness involved purportedly surreptitious cash transactions. Judge Claiborne was buying and selling at the time of these events two places of residence, some fine riding horses, and was making extensive home improvements. Moreover he was accustomed to a high standard of living. He consumed cash. Accordingly he cashed his checks at the casinos where he often had lunch or breakfast. These casinos often serve as substitute banks for Nevada residents. There was nothing surreptitious about these dealings. He often deposited the surplus amounts in his bank account. The evidence shows as well that the judge was accustomed to carrying large amounts of cash.

Another aspect of the circumstantial evidence focused on the background of the accused. The House brief attempted to attribute great significance to the judge's expertise in tax matters. Although a fine judge, Harry Claiborne is no tax expert. During his years at the bar, he repeatedly referred tax cases to other attorneys and dealt only with the criminal procedure aspects of those cases. He relied on Wright for 30 years and then on Watson to do his tax preparation.

As a matter of law, reliance on a tax accountant is justified if the judge fully disclosed all pertinent facts and if his reliance was in good faith. In this case, the judge had fully disclosed his income in both 1979 and 1980. He had reason to rely in good faith on Wright because Wright had done his taxes for 30 years without a hitch. He had a reason to rely in good faith on Watson because Watson came highly recommended by his wife and seemed to handle business competently.

A final aspect of the circumstances cited by the House brief involved the question of whether the judge turned a blind eye to the problems with his returns. With respect to 1979, it would be difficult to make that claim because the judge signed the return in blank. He relied fully on his accountant to correctly record the income reported by the April 11 letter. It certainly cannot be maintained that the judge deliberately arranged his schedule to be out of town so that he would have an excuse to sign a fraudulent return in blank. In the first place, he had no idea it would be fraudulent. In the second place, his out-of-town assignment was dictated by his judicial superiors. It was out of his control.

With respect to 1980, the House contended that the judge may have voluntarily kept himself ignorant of the gross errors it contained. From Judge Claiborne's perspective, he had already reported all of his income. He felt no need to double check the work of someone he had paid well to do his taxes. The evidence shows that Charlotte Travaglia, the employee who actually did the work on the judge's return, sought some advice from Watson about the treatment of some items. She placed the incomplete return on Watson's desk and had no further contact with it. A secretary in Watson's office saw the return and called the judge to come sign it. Judge Claiborne went to Watson's office on a lunch break when time was undoubtedly short. He thumbed through the return and signed it.

A few days later, Watson was in the judge's office with a bill for his services. At that time, the judge did question the 1980 return, but Watson assured him that he had checked the theory of the return with IRS agents who agreed with the figures on schedule D. The judge was satisfied "as long as you can support it," in the words he used with Watson at that time. Judge Claiborne pointed out why he wanted it clearly supported by saying to Watson:

"* * * I don't want any trouble with the IRS because I got all the trouble with the FBI that I can handle right now." This is an important insight into the judge's state of mind. He knew in 1980 that the FBI was angry with him and perhaps even looking for some way to hang his picture on their trophy wall. In that contentious state of affairs, it is simply inconceivable that Judge Claiborne would attempt to escape tax liability. Not even a 4-year-old attempts to raid the cookie jar when he knows he is being watched.

The sloppiness of the 1980 return is also significant. It is even more unlikely that in this time of tension Judge Claiborne would file a fraudulent return that begs for examination and audit. This is the equivalent of the judge shouting at the top of his lungs that he intends to raid the cookie jar and then proceeding to attempt the feat under his parents' noses.

SUMMARY ON INTENT

Each of the primary circumstantial factors cited by the House brief should not have been dispositive of this case. The House contended that the concurrence of these factors somehow cumulatively showed guilt, but if there is a reasonable doubt as to each of these factors, there must also be reasonable doubt as to their sum total.

NEGLIGENCE, NOT WILLFULNESS

With even this quick overview of the facts of this case in mind, it is easy to find extensive evidence of negligence. Willfulness—that intentional, witting, purposeful, crafty design—is another matter. If the evidence justifies a finding of negligence without willfulness, that would not justify a criminal conviction. In the absence of a criminal conviction, the House may not have urged impeachment. Indeed each of the Articles of Impeachment presupposed a criminal conviction and should not have been effective if the judge had been found to be only negligent. The Senate had to look behind the conviction to see if the judge had done anything that warranted the conviction the House contended as its sole basis for impeachment. Without the conviction, the judge had perhaps miscalculated taxes—a civil matter—which would not have warranted discipline anymore than an addition mistake on a tax return.

ETHICS DISCLOSURE

Another important fact demonstrates that the judge was not deliberately attempting to violate the law. He fully disclosed his 1980 income on his ethics report. Why would he deliberately evade taxes and then tell the Government the facts that disclose his fraud in another filing? This is incredible. If Judge Claiborne was acting with a criminal state of mind, it is inexplicable that he would lie on one Government filing and confess his guilt on another. The judge simply did not act willfully.

With regard to the 1979 ethics report, Judge Claiborne did fail to report some of his income. That is very understandable in light of the totality of the facts. The judge simply grabbed his tax worksheet—the one with Mr. Wright's erroneous suppositions about his 1979 income—when he filled out his ethics report.

VENDETTA

On the point of the Government's role in trying to "bag the judge," I would note that we all understand that law enforcement officers may not stoop to the level of a criminal in order to apprehend criminals. The revered Justice Brandeis gave us an excellent summary of the consequences of lawless law enforcement.

> In a Government of laws, existence of a Government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious.
>
> If the Government becomes a lawbreaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private citizen—would bring terrible retribution. *Olmstead* v. *U.S.*, 277 438 (1928).

In the case of Harry Claiborne, we have not had the opportunity to exhaustively examine the allegations of Government misconduct. That is regrettable. In any event, this body ought to guard against Government overreaching with great care. Where there is even a spectre of this dangerous abuse, we should carefully examine the consequences of that intrusive conduct. This body, too, has the responsibility to stamp out law enforcement abuses. This must not be left to the judiciary.

CONCLUSION

In summary, I do not think that this body can assert that Harry Claiborne purposefully, intentionally, wittingly—willfully—filed a false return. If he had intended to violate the law, he would not have done it so poorly. Neither the 1979 nor the 1980 return shows any evidence of cunning or guile. They contain mistakes discernible by a grade school observer. The judge relied too heavily on unreliable accountants. The judge was negligent in failing to check his accountant's errors. Frankly if one of the Articles of Impeachment had cited the judge's gross negligence and disregard, I would have voted to impeach. The House Articles, however, are all based on the criminal conviction. The criminal conviction is only valid if Judge Claiborne acted willfully. For the reasons I have cited, I could not find sufficient evidence of willfulness.

I listened very carefully to every aspect of the testimony before the Impeachment Committee. I compared each witness' statements to the assertions made by other witnesses. In the long run, I found Judge Claiborne to be a credible witness. I believed him. Moreover the evidence in this case supported the judge's explanations of the circumstances that led to his indictment and conviction. Giving the judge the benefit of the doubt, as I believe we are obligated to do when his life's work and reputation are at stake, the evidence did not support a finding of willfulness. The evidence clearly showed that the judge had been grossly negligent and had carelessly disregarded his obligations as a taxpayer. He did not, however, conspire or craftily design a plan to defraud the Government. In the absence of willfullness, beyond a reasonable doubt, he should not have been convicted, should not have been impeached, and, in my opinion, should not have been removed from office. This was why I voted not guilty on each of the Articles of Impeachment.

STATEMENT OF SENATOR ALAN J. DIXON

Mr. DIXON. Mr. President, the Senate today performed an extremely unpleasant duty. We have impeached a Federal judge for only the fifth time in our history. The last previous impeachment was in 1936—50 years ago.

I listened carefully to the distinguished House managers and Judge Claiborne's representatives on the Senate floor. I have reviewed the transcripts of the committee proceedings. I have discussed the issues raised by the prosecution and the defense at length with my colleagues in our closed sessions. I believe the evidence permits only one conclusion: That Judge Claiborne is guilty as charged in the four Articles of Impeachment, and I, therefore, voted in favor of all four Articles.

Article III of the four Articles of Impeachment, in my view, states a kind of "per se" case for impeachment. Essentially, that Article makes the argument that Judge Claiborne should be impeached because he was tried and found guilty in Federal court by a 12-person jury of two felony counts of filing false tax returns. In my own State of Illinois, the simple fact of his conviction for some crimes would automatically remove him from office.

Frankly, I find it unconscionable that a person serving a 2-year prison sentence should be able to continue to receive his judicial salary. Judge Claiborne had all the rights the American system of justice gives to anyone accused of a crime. He had the right to a trial by jury. Like any other defendant, he could not be convicted unless the jury found him guilty beyond a reasonable doubt. The jury in Judge Claiborne's case did find him guilty. He had the right, and exercised the right, to appeal his case. His appeal was heard by the court of appeals and turned down. The Supreme Court found no reason to overturn the jury verdict.

I think the Federal judiciary is no place for convicted felons, and that the third article of impeachment stated a sufficient case for impeachment. However, it is important for all of us to remember that the impeachment process is not part of our judicial system. Under the Constitution, the impeachment process is totally separate from and independent of ordinary judicial processes. The Senate had a responsibility to look behind the jury verdict and to make its own determination as to whether Judge Claiborne, as Judge Claiborne's defense phrased it, "willfully and knowingly made a false statement" on his 1979 and 1980 tax returns in violation of section 7206(1) of the United States Code.

I believe the Senate has made a full, fair, and independent evaluation of the charges. I will not take the time of my colleagues to recite the abundant evidence that convinces me that he is guilty. Let me simply say that I am convinced that Judge Claiborne willfully and knowingly failed to report almost half of the $41,072.93 he received in fee income in 1979. I am also convinced that Judge Claiborne knowingly and willfully failed to report $87,912 in fee income in 1980, and that he failed to report a taxable gain of $214,812 on the sale of his home, with the result that he reported taxes owed of only $1,101 for that year—about 1.1 percent of the $97,864 he actually owed.

Finally, Mr. President, I must say that I share the conclusions stated in the fourth Article of Impeachment. I believe his deliberate attempt to avoid paying his lawful tax obligations betrayed the trust of the people of the United States. His actions do reduce confidence in the integrity and impartiality of the judiciary, and do bring disrepute on the Federal courts and the administration of justice by the courts. The only way to restore that trust and confidence was for the Senate to take the action that it did take—to impeach Judge Claiborne and remove him from office.

STATEMENT OF SENATOR ARLEN SPECTER

Mr. Specter. Mr. President, the historical proceedings involving the trial of Judge Harry E. Claiborne are noteworthy not only because they are the first such proceedings to be held since the impeachment trial of Judge Ritter in 1936, but also because, for the first time, the initial evidence received in the trial was taken by a committee, and not by the full Senate.

Yesterday, the Senate conducted a rollcall vote on Judge Claiborne's contention that this process was unconstitutional, and constituted a denial of his right to a "full and fair" trial. The distinguished majority leader placed before the Senate the question: "Yes or no—the Senate should not hear additional witnesses in the case." The purpose behind this question was to determine whether or not the Senate should reopen the case and conduct a more extensive trial. The vote on the motion was yeas 61, nays 32, thereby obviating the need to continue the trial, and allowing the Senate to proceed to consideration of the four Articles of Impeachment.

I voted in favor of precluding further witnesses to be heard in this matter. A full 7-day trial was held before the Senate Impeachment Committee, comprised of 12 of my able colleagues. A trial transcript consisting of thousands of pages was made available by this committee. A series of preliminary motions made by Judge Claiborne were referred to the full Senate for consideration, and determination.

In my opinion, Judge Claiborne has been accorded a full and fair proceeding. It should be noted, the U.S. District Court Judge Harold H. Greene yesterday ruled that the committee procedure was constitutional.

Article I, section 3 of the Constitution declares that the Senate has the sole power to try all impeachments. The Constitution does not dictate the manner in which the trial shall be conducted, apart from its command that "no person shall be convicted without the concurrence of two-thirds of the Members present." Article I, section 3. The Senate thus has the authority to fashion rules that govern the admissibility of evidence, the scope of the proceeding, and the manner, form, and location in which evidence will be received. Therefore, Senate Impeachment Rule XI, providing for evidence to be received by a committee of Senators, falls within the discretion of the Senate's power to conduct an impeachment trial.

As to the issue of Judge Claiborne's guilt, I have been convinced, on the basis of the evidence adduced by the House managers, that

Judge Claiborne should be convicted on three of the four Articles of Impeachment. The House established that Judge Claiborne received and negotiated checks representing income received in 1979 and 1980 that was not reported on his income tax returns. This was set forth in prior admissions under oath by Judge Claiborne, through prior sworn testimony of witnesses, and by live testimony of a number of those same witnesses.

This evidence establishes that Judge Claiborne willfully and knowingly made false statements on his 1979 and 1980 returns in violation of title 26, section 7206(1) of the United States Code. Articles I and II of Impeachment. The testimony and written documentation depicts the changed behavior of Judge Claiborne—cashing fee income checks at local casinos, rather than at the bank which he had been utilizing for years, changing accountants to prepare tax returns despite a 30-year relationship with one accountant, Mr. Joseph C. Wright, and dealing in large amounts of cash. The defense, rather than succeeding in rebutting this evidence, concentrated on developing a picture of judicial and prosecutorial misconduct against Judge Claiborne. Although such allegations are indeed serious, and have been examined by this body, they are not determinative on the issue of guilt or innocence in this case.

As to Article III, I do not believe that that is a sufficient basis for impeachment. In my opinion, the Senate has a duty to make an independent determination of the underlying facts. That has been done on Articles I, II, and IV. The Senate should not merely accept the judgment of the U.S. district court in which Judge Claiborne was tried and convicted. Accordingly, I do not believe that Article, Article III, establishes in and of itself a basis of impeachment.

As to Articles I, II, and IV the evidence establishes that Judge Claiborne has betrayed the trust of the people of the United States, reduced confidence in the integrity and impartiality of the judiciary, and thereby brought disrepute on the Federal courts and the administration of justice. Such conduct by a Federal judge—one who should warrant respect from the American people—is particularly heinous. Our citizens have the right to expect and even demand proper conduct on the part of public officials, whether they be elected or appointed. As Judge Claiborne's case has emphasized, Federal judges are unique in that once convicted even by the trial court system of illegal conduct, the people may not simply vote them out of office if they so choose, assuming that the party refused to resign. Instead, a judge reluctant to relinquish his office must be subject to the impeachment procedures established by the Constitution.

The full gamut of those procedures has now been exhausted. Judge Claiborne has had his day in court, before the House, and before the Senate. It is time for him now to become an ordinary U.S. citizen, convicted of a felony offense, who must serve his remaining time in prison, without the reward of believing that he can then return to his bench and resume life as before. Judge Claiborne must pay for the offenses he committed, and can no longer assume the distinguished mantle of a Federal judge.

STATEMENT OF SENATOR DAVID PRYOR

Mr. PRYOR. Mr. President, today I rise to speak against the raw and awesome power of the Federal agencies of the U.S. Government and about an abuse of that power that I truly believe led to the ultimate conviction in the lower court of Judge Harry Claiborne.

Mr. President, I rise today to speak for the opportunity, if not the basic right, of every American taxpayer to have the right to face an auditor of the Internal Revenue Service Civil Division to explain their tax return before criminal prosecution starts. Judge Claiborne did not have that opportunity. He was denied it.

Mr. President, I rise today to speak against what has become the accepted practice of arbitrarily and capriciously targeting individual citizens of our country, of intimidating witnesses in their trials, of forgiving past crimes to testify against particular people, of ensnaring individuals into crime or become Government bounty hunters.

This is not what our Government or our country must stand for. The framers of our Constitution never intended it this way. In fact, in their wisdom and in their vision, they made it possible, as in this particular instance of Judge Claiborne, for the legislative branch to have a check over the judicial branch of Government.

Our constitutional framers spoke eloquently to the majesty and to the strength of our American system when they permitted one Harry Claiborne to bring his case to the court of last resort, the U.S. Senate.

After sitting for days as a member of the impeachment committee, I have attempted to the best of my ability to fairly judge and determine the case of Harry Claiborne. I must admit to my colleagues that a month ago, I, like most Americans, wondered why we were giving him even the benefit of the doubt. As the weeks passed, after reading transcripts and listening to and observing witness after witness, I must say at this time, and during this day, that at least in my mind there was a reasonable doubt about his willfulness or his deliberate intent to defraud the Government.

But, Mr. President, there is no reasonable doubt in my mind about another aspect of this case, and that is the long arm of the U.S. Government and the abuse of power that ultimately led to Judge Claiborne's conviction.

I have concluded that he was targeted by the Federal Bureau of Investigation in a very arbitrary and capricious manner. If we have any doubts about Judge Claiborne having been a target, then I ask these questions:

Why did our Government forgive $16 million in back income taxes to a criminal fugitive named Conforte to come back from Brazil and help make a case against Judge Claiborne?

Why did Harry Claiborne, unlike most other citizens, not have the opportunity to face an IRS audit in the civil division before criminal prosecution charges occurred?

Why did one IRS agent assigned to this sting operation of Harry Claiborne become so incensed and rebelled to the degree that he refused to participate, and ultimately was demoted and sent to another state?

Why was it that after administering a polygraph test to Harry Claiborne, a test which he passed, the polygraph operator, himself, became a target of intimidation by the Federal Bureau of Investigation?

What is going on in this country when we allow this sort of practice to occur?

In the Article of Impeachment No. III, we were asked by the managers to impeach from office Harry Claiborne. Why? Because, simply, he was convicted by a lower court and a jury.

My question concerning Article III this afternoon was, how was that conviction actually obtained?

Once again, I have concluded in my own mind that had Harry Claiborne not been a target of the Federal Government, had Harry Claiborne's accountant not been intimidated by the U.S. Government, had Harry Claiborne had the opportunity to submit all evidence into the lower court decision and trial, had an appeal en banc to the Ninth Circuit Court of Appeals been granted, I believe the case of Harry Claiborne might not have been before the U.S. Senate today.

No, Mr. President, I cannot, as one Senator or as one American, defend Harry Claiborne's abysmal tax return, especially for 1980.

No, I cannot defend his cashing checks at the casino and, no, I certainly cannot defend his Elmer Gantry type tax preparer. But especially, Mr. President, I cannot defend how this conviction was ultimately obtained.

The Federal Bureau of Investigation sent a special representative to Nevada by the name of Yablonsky. Mr. Yablonsky evidently was given the widest and unchecked latitude to headhunt in Nevada. He wanted someone big and someone important. Did he go after the drug lords? Did he go after the major crime figures? Did he go after the child pornographers? No. He went after Judge Claiborne, and allegedly he also wanted Senator Laxalt. He said he did not like Laxalt. I ask, is that the criteria our Federal Bureau of Investigation uses in going after someone?

I fear that there are too many Yablonsky's out there in this country, working for various agencies of government, who have become headhunters. They are unchecked. They are unbridled. They are people who arbitrarily and capriciously make these decisions which can suddenly bring to a crushing end the careers and lives of any American citizen they so choose.

The next Yablonsky may not like the names of people like Matsunaga or Boschwitz or Lautenberg or Iaccoca or Smith or Jones. What happens then? Where do we install this system of checks, and when is our Government finally going to realize that these sorts of operations represent not the best but the worst within our system?

They set up Pete Williams. He was entrapped. They tried it on Senator Pressler. He smelled a rat.

The Claiborne conviction, Mr. President, is over. In my opinion, it is the fruit of the poisoned tree.

Judge Harry Claiborne has been found guilty. He has been impeached and removed from office, as I have said.

I hope that the resolution that I and other Members of this body will introduce within the next several hours, or certainly the next several days, calling for a full and total investigation of sting operations—how they are set up, how they are administered, and what checks and balances must be placed in that area of our system of Government—will certainly be passed by the great majority of this body.

Mr. President, we have seen a very sad day today, but I must say, also, that it has been a day when we have seen the majesty and the strength of our system work. I hope it worked well, and I hope it will be a lesson for us in the future, to make certain that such situations do not happen again.

Mr. President, I yield the floor.

STATEMENT OF SENATOR HOWELL HEFLIN

Mr. HEFLIN. Mr. President, we have just finished a very historic event in the U.S. Senate; that is, the U.S. Senate has just sat as a court of impeachment and has removed a life-tenured Federal judge from office.

I have some thoughts that I would like to mention in a preliminary manner now, but I will develop and set them forth in a more succinct manner at a later date.

First, I think there is no question that most of the Members of the Senate feel that there should be an investigation by an appropriate committee pertaining to the possible overreaching by the executive branch into the judicial branch and an investigation into the procedure which has been called targeting.

I am not accusing the Executive Branch, the Department of Justice, the FBI or the Internal Revenue Service of improper targeting or of improper activity. But I feel that there is enough smoke to justify whether or not a fire exists.

We also had in recent years the Abscam incidents. It seems to me that if an appropriate committee of Congress investigates what potentially may have been an abuse of power in Nevada—it may not have been, I am not accusing anyone—but they should also take a look into Abscam.

I think that a vast number of the Members of Congress feel that a thorough investigation ought to be made and that we ought to look into both incidents and determine whether or not there was targeting. Further, we should determine whether the targeting was proper or not. I think we all know that sting operations by the Department of Justice are necessary and that they may have to operate in a certain manner to catch some serious violators of the law. I think we must bear in mind that if you are going to apprehend criminals, sometimes it is necessary for FBI agents and others to disguise themselves as being "gutter brothers" and get into the gutter with the criminals. On the other hand, there is the potential for overreaching, there is the potential that someone may be out to get someone and that proper due process is not allowed the targeted person. Therefore, I think a thorough investigation is needed to determine if proper due process was allowed in the above two cases.

Second, I believe that a 100-man jury is too cumbersome and is unworkable. I think that we ought to examine what the States have done relative to the judiciary and the removal from office of judges who have become corrupt.

Most of the States originally followed the Federal pattern if they had a bicameral system of legislation which established the Senate as being the court of impeachment, and required the House of Representatives to act as a grand jury, or the indicting body.

Many of the States found that this procedure presents numerous problems and, therefore, they adopted other methods. Some States have created judicial inquiry commissions which are very representative and have broad-based membership. The members come from the laity, the judiciary, and some members come from the lawyer ranks. The commission in effect serves as the investigating body and the indicting body. There is a separate mechanism, usually composed of something like 10 or 12 people that would be a court of the judiciary, or a judicial commission, which would determine the guilt or innocence of the accused under the articles of the indictment that would come from the judicial inquiry commission. Most of the States have found this procedure to be workable. It has been adopted in their constitutions, and has proved to be very effective. I am going to study the various systems that now prevail in the States and I am going to offer a constitutional amendment to alter the Federal pattern when we return in January at the start the 100th Congress.

I feel like we ought to explore alternatives. In my own home State of Alabama we adopted a different procedure from the Federal scheme. We have a court of the judiciary, and a judicial inquiry commission which serves as the grand jury. There are other systems in the States. I think we ought to study them all.

I think we ought to replace the procedure that we have because in my judgment a 100-man jury is too cumbersome and is unworkable. When Judge Claiborne was giving his argument or testimony here on the floor of the Senate, I counted the number of Senators, in attendance and there were 63 present. Thirty-seven were absent. I think it is very crucial that all Senators should have been in a position to hear what he said at that time.

I suppose that throughout the entire proceedings there could have been as many as 30 Senators that never heard a word of the argument. If we are to sit as a court of impeachment, I think it is necessary that each individual Senator hear the arguments, read the transcripts, read the briefs, and prepare. Because, in effect, we act as judges. And I feel our system is not effective, I think it is unworkable, and I think as we look to the future, we can expect many, many more instances of impeachment or proposed impeachment of members of the judiciary.

The judiciary has grown, and it is now in the neighborhood of around 1,000 judges. There is no question in my mind that there are some bad eggs, or bad apples in the barrel, and that we need to look at this now. But, at the same time, we must protect the independence of the judiciary.

Therefore, I say to the Members of the Senate, let us benefit from the experiences of the States who have experimented with other systems. Some of those procedures have been in existence for 30 or 40 years. I think we can profit from a study. In my judgment, we need to adopt a better forum by which a life-tenure judge is removed from office.

Thank you, Mr. President.

[Congressional Record—October 10, 1986—S 15843]

STATEMENT OF SENATOR DENNIS DeCONCINI

Mr. DeConcini. Mr. President, an impeachment trial is a rare event, thankfully. Our corps of Federal judges on the whole are a marvelous collection of people who exhibit the combination of intelligence, fairness, and integrity. It is a sad day for them and for the country when we are made aware that a Federal judge has so conducted himself that a jury finds beyond a reasonable doubt that the judge is guilty of a felony. Our duty in the legislative branch, first to bring articles of impeachment and then to conduct a trial, must follow if the convicted individual has not resigned.

Having observed Judge Harry Claiborne over a number of days during hearings of the Special Impeachment Committee that received evidence, and having observed the various witnesses before that committee and reviewed the written record of events related to Judge Claiborne's activities, I concluded that Harry Claiborne violated his high position of public trust and must be removed from office.

The evidence that he violated the criminal tax laws is overwhelming. Let me briefly summarize some of the factors that led me to this conclusion.

I will begin with tax year 1980. This was the year that Claiborne changed from his accountant and friend of 30 years, Mr. Joseph Wright, to Jerry Watson of Creative Tax Planning. For the second straight year, Claiborne engaged in what may be described as surreptitious cash transactions by cashing a large check at a local casino rather than depositing it in his bank.

For the taxable year 1980, Claiborne substantially understated his taxable income. He failed to recognize a $214,812 capital gain, and failed to report $87,912 in legal fee income. This was in addition to his salary as a Federal judge, $54,000, and his investment income of $2,751. On this income well in excess of $300,000, Claiborne paid a total tax of $1,103. His tax liability, had it been paid as required by law, would have been $97,864. It is inconceivable to me that this would not have raised questions in Claiborne's mind.

Other factors on this return are also most troubling. The errors that were made just happened to be on forms that are not ordinarily reviewed by the IRS in their automatic data verification. The offsetting of ordinary income against supposed capital losses on schedule D defies belief. The attempt to take a capital loss of $250,000 on a sale that never occurred is preposterous. The wholesale miscalculation of the sale of his home—all errors being in his favor, naturally—simply adds to list factors that make me believe that Claiborne knowingly and willfully winked at obvious errors on his tax return that redounded to his benefit.

Claiborne was also convicted by a jury for willful violation of the tax laws as they related to his 1979 return. In short, the evidence is that Claiborne again underreported his income from legal fees by about one-half. Claiborne received approximately $44,000 in legal fees from his former legal associates. He reported a little over $22,000 of this to his accountant. Contrary to his long held practice of cashing checks received for legal work, he cashed 8 of the 14 checks he received in 1979, at local casinos.

The total amount of legal fee income in 1979 is variously reported by Claiborne. In a letter of circa March 1, 1979, to his account, Claiborne claimed legal fee income of $45,371; in a letter Claiborne claims to have sent to Wright on April 11, but which Wright has no knowledge of, Claiborne claims income of $41,073; on his May 15, judicial ethics disclosure form he listed income of $23,050; and finally, on his tax return he listed income of $22,332. Four different figures within 100 days. The net result was that Claiborne underreported his income by approximately $18,000.

Claiborne was convicted for his violations of the tax law for 1979 and 1980, but these years only appear to be a part of a much larger pattern of underpayment of his taxes. In 1978, he was required to pay a tax deficiency of approximately $75,000 on his 1977 return; we have discussed his underreporting in 1979 and 1980; but yet again in 1981, as a result of his claim of a tax loss carried forward from 1980, he offset, illegally, $40,000 in ordinary income against this capital loss, as well as taking the $3,000 deduction he would have been entitled to if the underlying transaction has not been fraudulent. It certainly appears that Claiborne engaged in a long-term pattern of tax evasion and misrepresentation.

Mr. President, throughout the proceedings, I have been troubled by what I sense is an evasion by Judge Claiborne of the issues for which he is being tried. As the chairman of the House Managers stated during his presentation, Judge Claiborne wants us to try everybody but Harry Claiborne. His testimony before the full Senate is devoid of any comment of explanation concerning his 1980 return; it does not try to explain how he justified his payment of just over $1,000 in taxes in 1980 when every indicator pointed toward payment of a higher amount. Indeed, just weeks before he filed his return he had written a check to the IRS for over $20,000 when he assumed his liability to the Government for that year would be about $43,000 in total. His testimony doesn't explain why, when in 1979, his accountant, Joseph Wright, asked him for checks for $16,000 and $4,000 to pay his 1979 tax liability and make his quarterly payment of estimated taxes for 1980, he instead gave Wright checks for $8,000 and $2,500.

One excuse we did hear from the judge was that he was overworked. Now, I can sympathize with many Federal judges I know who do put in long and strenuous hours, but the statistical record reflects that Harry Claiborne didn't even match the average productivity of his brethren. For example, in 1979, Claiborne disposed of 185 cases, the national norm was 325; in 1980, Claiborne disposed of 303 cases while his brethren averaged 349; it was the same again in 1981 with Claiborne at 245 and the national average being 384; and again in 1982 with the national average being 409, for Claiborne it was 351. I realize that statistics don't always truly reflect workload, but a multiyear sampling like this certainly might lead one to conclude that Claiborne wasn't quite the dynamo of judicial activity that he portrays.

Finally, I would like to express my overall concern about Judge Claiborne's fitness and integrity to serve on the Federal bench. Symptomatic of this general concern are the actions taken by Judge Claiborne in the *Matter of the Sealed Affidavit; U.S.* v. *Joseph Agosto; U.S.* v. *the United States District Court for the District of Nevada,* 600 F.2d 1256 (1979). This was a case in which Judge Claiborne unsealed and released to Oscar Goodman, a 131-page master affidavit describing an ongoing Federal investigation of substantial proportion. A similar affidavit had been sealed by another Federal judge until a later date "to avoid disrupting the nationwide investigation of which the Las Vegas investigation was a part." In so releasing these documents, I believe Judge Claiborne exercised extremely poor judgment. I say this with the greatest of understatement. In looking back upon the seeds of the distrust with which the Las Vegas strike force viewed Judge Claiborne, this event may well have been the catalyst to later aggressive behavior on their part. It is clear that the strike force concluded that the judge, by releasing this information, had not merely engaged in poor judicial judgment, but possibly in actions a good deal more sinister in their import.

Mr. President, I would like to conclude by praising Senators Mathias and Sarbanes for the diligence and fairness with which they conducted the committee of 12 that received evidence in this case. Every effort was made to give Judge Claiborne the greatest possible latitude in seeking evidence and witnesses. At all times these gentlemen, as chairman and cochairman, exhibited the highest values associated with due process and the rights of the individual. The same can also be said for the other members of the committee. The high level of discussion and interest in the rights of the individual and fair play carried over to the closed Senate debates and I congratulate my colleagues for their professionalism.

Finally, I would be remiss if I didn't heap particular praise on the Senate Legal Counsel's office so ably headed by Michael Davidson. Mr. Davidson was thoroughly professional at all times, under the most trying of circumstances, and battling legal issues for which no precedents existed. At all times he has been a credit to the legal profession and to the Senate. He was ably assisted by Ken Benjamin, Nancy Bradshaw, Morgan Frankel, Sarah Fox-Jones, and Barbara Thoreson. We appreciate their dedicated public service and that of the staff of the Rules Committee.

I also want to thank Bob Feidler, counsel to the Senate Judiciary Committee, who has worked closely with me on this matter, and two outstanding legal interns with the committee, Brad Kerby and Doug Drury, for all their assistance.

STATEMENT OF SENATOR ROBERT C. BYRD

Mr. Byrd. Mr. President, the responsibility imposed on the Congress for article II, section 4 of our U.S. Constitution, is perhaps the most solemn and painful duty that we Members of the legislative branch must perform.

That section states:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

This is the only instance in which the legislative branch of our Government acts in a purely judicial capacity. Article I, section 2, clause 5 we find these words,

> The House of Representatives * * * shall have the sole power of impeachment.

We find in article I, section 3, clauses 6 and 7:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Article II of section 2, clause 1 states as follows:

> The President shall * * * have Power to grant Reprieves and Pardons for Offenses against the United States except in Cases of Impeachment.

I have already read article II, section 4. Article III, section 2, clause 3 states:

> The trial of all crimes except in cases of impeachment shall be by jury.

So, Mr. President, this is an awesome power that the Senate holds under the Constitution. And similarly, it is an awesome duty upon Senators. No official who comes within the parameters of that constitutional language, and no person, no Vice President, no civil officer of the United States can escape the reach of article II, section 4. The Senate can remove any President, any Vice President, any civil officer of the United States in impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. And no Presidental pardon can be given to any such party who is impeached and convicted under those constitutional provisions.

The historical antecedents of this impeachment process extend back through history over a period of hundreds of years. Impeachment has been described by the notable historians as the chief institution for the preservation of government. It developed as a logical way for the Parliament of England to exercise control over the British judicial system and to keep the King and his ministers from becoming too authoritarian.

The framers of our U.S. Constitution were very familiar with its essential purpose in maintaining a democratic form of government. They included it in our own Constitution to assure that all officers in our Government remained accountable to the people—to the people through their elected representatives. Now for the 13th time in our Nation's history, and the first time in over 50 years, the U.S. Senate has been required to try an impeachment of a civil officer, U.S. District Court Judge Harry E. Claiborne.

I believe that the Senate undertook this duty responsiblity, and with a judicious sense of purpose. The committee of 12 Senators appointed by the distinguished majority leader and myself pursuant to Senate Resolution 481 passed on August 14 of this year spent 7 full days in hearing witnesses, and compiling testimony for the

Senate as a whole to evaluate and to analyze. The transcript of these proceedings, almost 1200 pages of text, as well as 3 additional volumes of exhibits, were printed for each Senator to study.

I take this opportunity to praise publicly, as I previously have done privately, the diligence and the exceptional hard work of those members of that committee, Chairman Mathias and Vice Chairman Sarbanes, both of Maryland, and Senators Hatch, Warner, Rudman, Pressler, McConnell, Heflin, DeConcini, Pryor, Gore, and Bingaman.

I carefully studied the transcript and the post-trial briefs of the two parties. And I concluded that there was more than sufficient evidence on the record to sustain a verdict that Judge Claiborne did willfully and knowingly file tax returns for tax years 1979 and 1980 that understated his taxable income by substantial amounts. He signed and verified those returns with a written declaration under penalties of perjury.

I believe it is clear that Judge Claiborne either knew of the substantial understatement of his taxable income on his returns or he went to such great lengths to avoid knowing that he may be deemed to have had constructive knowledge of the returns' falsities. A jury of 12 of the Judge's peers found him guilty of two counts of violating section 7206(1) of title 26, United States Code, which is the criminal statute for committing tax fraud or filing a false return. By having been convicted of these felony charges by a trial jury of the judicial branch of our Government—A verdict with which I can fully agree based on my review of the evidence—Judge Claiborne has brought dishonor and opprobrium on our Federal judiciary. Mr. President, I voted to convict Judge Claiborne on three of the four articles of impeachment brought by the House of Representatives. I would now like to briefly summarize the evidence that I believe was probative and helped me reach the verdict of guilty.

The critical issue that must be decided to sustain a violation of title 26, United States Code, section 7206(1) is whether the conduct was done "willfully". Section 7206 provides in pertinent part:

> Any person who—
> (1) * * * willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony * * *.

The Supreme Court has recently refined the definition of "willfulness" in construing that statute as "a voluntary, intentional violation of a known legal duty." As the House managers pointed out in their post-trial brief: "A crime whose very purposes is to conceal is not often telegraphed with direct proof."

Consequently, Mr. President, courts have held that "intent" may be inferred from statements and conduct. *United States* v. *Cusino,* 694 F.2d 185, 1867 (9th Cir. 1982). Several court opinions have laid out the elements of circumstantial evidence on which the Government may rely to prove "willfulness."

The case that I found particularly meaningful in detailing certain of these elements was one in which Judge Claiborne had served as defense counsel, which proves that the judge was aware of these elements, *United States* v. *Conforte,* 624 F.2d, 869 (9th Cir. 1978). The decision in that case held that "willfulness" may be inferred from: "The extensive use of currency and cashier's checks to satisfy obligations"; a "pattern of understatement of income in successive years"; the "use of memory, surmise, estimates, or a careless disregard in making of tax returns"; a "taxpayer's effort not to learn what his tax obligations are"; and the "presence of large sums of money in cash not deposited in a bank."

The transcript of the committee hearings shows numerous examples where the judge conducted his business affairs in a manner comparable to those listed above.

"Extensive use of currency and cashier's checks to satisfy obligations": Judge Claiborne cashed increasing numbers of legal fee checks at the local hotels and casinos in Las Vegas, which had the effect of making the receipt of this income much more difficult to trace. When questioned about why one would need $37,500 in cash in his pocket—one legal fee check—or $44,256 in cash from a Government tax refund check cashed at the Golden Nugget Casino, his answers were unconvincing and raised questions about other laws that he may have violated. He said that he paid workers in cash to remodel his house and stated incorrectly, when asked, that he had no obligation to pay Social Security withholding on those workers' wages.

He claimed that he cashed the $44,256 refund check because he was considering purchasing some quarter horses in Mexico. He never concluded that purchase and stated that he ended up buying some real estate with the cash. No explanation was given for why the money was not deposited in a bank, why large payments on real estate would not better be done by check, or even how one can carry that much cash in one's pockets, let alone feel safe while doing it.

The one salient bit of information that I did glean from this peculiar pattern was that Judge Claiborne did have time to pursue personal projects like buying livestock, supervising numerous remodeling projects, and working on real estate investments. This would seem to contradict one of his main lines of defense, namely, that he had let his personal financial affairs go to pieces because he was so all-consumed by his judicial duties. He stated that his 14-hour work days left him no time to examine his tax returns as they were prepared or to keep records of his business income.

However, when it served his financial interests, Judge Claiborne was capable of compiling and listing carefully detailed financial information. He delivered to his accountant, Jerry Watson, a three page listing of the items comprising the cost basis on the house that he sold, in meticulous detail down to the last cent.

A "pattern of understatement of income in successive years": The facts presented at both trials and admitted into evidence by the Senate Impeachment Committee prove without dispute that Judge Claiborne understated his taxable income by $18,740.06 in tax year 1979. For the 1980 return, the judge failed to report $87,911.83 in legal fees by incorrectly and illegally writing them off against a phony capital loss on the nonexistent sale of his law practice that he had previously fully depreciated in 1978. In addition, he failed to report a new capital gain on the sale of his house of $214,000. In tax years 1981 and 1982, he again used the fabricated capital loss to offset $40,000 in 1981 and a comparable amount in

1982 in legal fees that should have been reported as ordinary income. In addition, with a careful reading of the committee's transcript, we must deduce that the judge significantly underreported his 1977 tax obligation as well, because he withdrew $74,000 from a safe deposit box in a hotel—the balance of a $100,000 gift from a friend and kept in the hotel's safe—in August 1978, to pay a tax deficiency for tax year 1977.

"Use of memory, surmise, estimates, or a careless disregard in making tax return": The record before us in the Senate was replete with evidence on this point. We are told that the judge had previously deposited all fee checks in his bank account. His accountant, Joseph Wright, was instructed to compute his legal fee income each year by tabulating those deposits from statements sent to Wright by the bank. Then we learned that the judge no longer deposited all fee checks in the bank but cashed some of them at casinos; he also stopped sending his bank statements to Mr. Wright. Mr. Wright no longer had any way of verifying Judge Claiborne's income.

The judge at various points in the spring of 1980 gave Wright different, conflicting figures for his 1979 legal fee income, that I will detail below. In addition, the judge testified that his personal system for keeping track of his income consisted of writing the amount of each fee check on a slip of paper at work, putting the slips in an envelope, and periodically carrying the envelope home to write the amounts in a personal financial diary at some later date. But he did not use this system methodically: Sometimes the slips were misplaced; the envelope was lost at one point during a move, and this required him to estimate his income several different times. The record clearly indicates that the judge displayed a "careless disregard" in compiling his personal records and in the making of his tax returns.

A "taxpayer's effort not to learn what his tax obligations are": This is the indicator of willfulness that I find to be most blatant. Judge Claiborne testified that he signed his 1979 return in blank—although this point is disputed—and never looked at it when he got a final copy. Before hiring Jerry Watson to fill out his 1980 return, he had been told that he would owe a significant amount of tax for that year, as indeed he should have. He himself seems to have prepared the form 4868 requesting an extension for filing his return; on that form he reported that his 1980 taxes would be $42,847.96, and he submitted a check for $20,817.59—the difference between what had been withheld and what he estimated he owed. Just 2 months later he signed the return prepared by Watson that showed him owing not $42,847.96 as he himself had computed, but $1,103.00. He signed a return that just wreaks of being defective. Filled out in pencil, with arrows indicating needed changes on the form, and including errors that even the slowest neophyte on taxes would not make, the judge signed it. The only question he asked Mr. Watson was "are you sure that this is correct?" But he had never asked the preliminary question that would have made a "yes" answer meaningful: What are your qualifications to fill out and evaluate a return? What is your educational and professional background? What experience have you ever had in coping with a professional personal-service business and the schedule C form, capital gains and losses and the schedule D form, and the form 2119 for the sale of a residence?

It is clear to me that Judge Claiborne deliberately did not want to know anything about his tax obligations, based on the overview of the evidence that I have listed above. There is, however, a substantial body of case law that states that a jury may properly infer that a taxpayer has read and approved his tax return if his signature appears on the return. See, for example: *United States* v. *Romanow,* 505 F.2D 813 (1st Cir. 1974). "The signature at the bottom of the return is prima facie evidence that the signor knows the contents of the return." *United States* v. *Harper,* 458 F.2D 891, 894–895 (7th Cir. 1971). The judge signed his tax returns. He, like every other "average" citizen has a sworn duty to believe and support the information included on his tax return. I believe that the evidence fully supports, beyond any doubt, that Judge Claiborne committed "a voluntary, intentional violation of a known legal duty". His conduct was "willful" as required to prove a violation of 26 U.S.C. sec. 7206(1).

THE 1979 TAX YEAR

During 1979, Judge Claiborne received 14 fee income checks that totaled $41,072.93. This amount is confirmed by adding up the checks listed as House managers' exhibits 1–14 and also by adding up the notations the judge made in his personal record book for fee income received in 1979.

In March 1980, the judge sent his accountant, Joseph Wright, a note asking that Wright notify a mortgage company that the Claiborne legal fee income for 1979 was $45,371.93 (later changed to $46,371.93). The note included a list of earnings identified as being a "tabulation taken from my deposits and authentic." Because this was the only figure that Wright had received by the time the judge's request for an extension form 4868 had to be filed, he used it to compute the estimated tax due for 1979. When Wright told Claiborne that he would need to send in $16,000 to cover the taxes owed, Claiborne responded by saying that the tax owed would be less. He sent a check for $8,000 on April 11, 1980.

Judge Claiborne says that he talked with Wright sometime before April 11, 1980, and indicated that of a $20,622.17 deposit, only $10,000 was actually a fee, with the balance being a rollover of a time certificate of deposit with interest. This was erroneous, and Claiborne rests his case on a letter that he says he drafted and had delivered to Mr. Wright on April 11. The letter states that his fee income was $41,073.93.

However, Joseph Wright testified that he never received that letter and had not seen it until Mr. Goodman showed it to him (produced from the judge's files) in late 1983. On May 22, 1980, Wright still had the understanding that Claiborne's legal fee income for 1979 was $45,371.93, and he used that figure in letters to mortgage companies. But he claims that Judge Claiborne called him between May 22 and June 15, when the tax return was filed, and eliminated certain items of income so that the total was dropped to $22,332.87. This amount was listed on his schedule C for that year as fee income. The judge himself used a figure of

$23,050.76 to report his 1979 legal fee income to the judicial ethics committee.

The resolution of this controversy largely depends on whether one believes Judge Claiborne or Joseph Wright. I personally cannot understand how anyone could supposedly write a letter on April 11 that said his legal fee income was $41,073.93 and barely 1 month later, on May 13, fill out his judicial ethics financial disclosure form listing legal fee income of $23,050.76.

I believe Mr. Wright's explanation of what must have happened, and I find the judge's version lacks credibility. But I might have been inclined to grant him some benefit of the doubt were it not for the incredible tax return the judge filed in 1980.

THE 1980 TAX YEAR

In the spring of 1981, during the time 1980 tax returns typically were being prepared, Judge Claiborne in effect fired his long-time accountant, Joseph Wright. He made the acquaintance of Jerry Watson, who purported to be a financial adviser and tax consultant and who owned the Creative Tax Planning Co. In fact, Mr. Watson only had a high school diploma, had no training at all in any accounting or business courses, and had been fired from several previous jobs that he had held. Witnesses testified before the committee that Jerry Watson had a generally poor reputation around town for the quality of his work. The judge, however, on first meeting Watson, was impressed with his manner and mentioned to him that he had been told previously that he would owe substantial taxes for the 1980 tax year and might need some assistance.

But the judge did not retain Watson until after he had received a letter from Watson, dated April 6, 1981, elaborating on how a business loss could be taken on the judge's old law practice. The letter also indicated that no tax would be owed on the sale of the judge's house. Less than 1 week later, the judge personally filed a request for extension form 4868 that indicated he expected to owe $42,847.96 in taxes for 1980. He submitted a check for $20,817.59 as the balance due on this estimated return.

In the meantime, the judge discussed with Jerry Watson at least twice, and possibly three times, the possibility of taking a loss on his law practice that he had abandoned upon taking the bench in September 1978. Watson testified, and the judge did not deny it, that they spent more than 1 hour in total time discussing the fair market value of the firm (including valuations of $5,000 for his rolodex file—which he admitted at the hearing he did not even have; $5,000 for his phone number and yellow page ad; $110,000 for 26 years of goodwill; the value of a client list; accounts receivable for cases still pending; valuations for briefs, points, and authorities; and so on.)

Watson arbitrarily decided that the fair market value of the firm had to have been at least $250,000. But at this point, several facts leap out that strike anyone right in the face with any tax knowledge, or anyone who merely reads the schedule D form, as simply outrageous:

First, they listed the law firm as an asset acquired in 1978, when in fact the judge had started it from nothing more than 25 years before;

Second, they listed the cost basis of the firm as $250,000 when, in fact, that was their "guesstimate" of fair market value; all tangible assets of the firm had been fully depreciated in tax year 1978, so that the cost basis was actually zero. Again I emphasize, they used their "ballparked" (their term) estimate of fair market value which is totally incorrect in determining a capital loss;

Third, they determined that the sale price was $150,000, even though there had been no sale, never had been any sale. From this they subtracted the phony, fabricated cost basis of $250,000 to create an equally phony loss of $100,000.

The really creative part of this return was discovered when it was admitted by Watson that he had taken the judge's $87,911 of legal fee ordinary income for 1980 added to that roughly $12,000 of fully depreciated law books that he had simply given away and invented the remaining $50,000 to equal the sales price of $100,000.

Fourth, no schedule C on which ordinary income from a personal business was listed was filed even though Claiborne had filed that form for at least the preceding 20 years.

The judge and his accountant had in effect masked ordinary income as a deduction against a fabricated capital loss. They also used this fabricated capital loss to offset ordinary income for the 2 years that followed. That is the transaction that never was.

The judge later tried to slough off any culpability by saying that he had not looked at the return and really was not knowledgeable about these types of tax matters. When he received his return from Watson that showed him owing $1,103 instead of the $42,848 that he himself had calculated 2 months earlier, he took no action; when he received a refund check for $44,256 some time later, he still did not look at the return to try to determine what the problem might be.

Evidence was also presented before the Senate hearing that showed flagrant miscalculations on the judge's form 2119 so that it showed no tax owing on the house he sold for $725,000 on which he had a cost basis of $362,000. Because the house he purchased subsequently only cost $285,000, the judge owed tax on his accumulated capital gain of $314,000 minus the $100,000 he appropriately excluded for being over 55 years of age. This $214,000 capital gain was omitted from his return.

With the facts there presented, I have no difficulty in determining that Judge Harry Claiborne did not believe these returns to be true and correct as to every material matter, and that he well knew and believed that he received, and failed to report, substantial income in addition to that stated on the returns, in violation of section 7206(1) of title 26, United States Code. So, I think the Senate rightly adjudged him to be guilty of misbehavior and guilty of high crimes and misdemeanors. These facts lead me inexorably to conclude that his impeachment and removal from office under articles I and II of the impeachment resolution were fully warranted.

Article III of the impeachment resolution states that, because a 12-person jury of his peers found the judge guilty of two felony convictions for which he is serving a 2 year prison sentence and has paid a $10,000 fine, he is guilty of misbehavior and is guilty of high crimes and should be removed from office.

Mr. President, I voted "present" on that article. I did not want the support of that article to be misinterpreted as meaning that the Senate has no role to play when a person has been convicted previously by our judicial branch of Government. Nor did I want the Senate, in a future case in which the court may have failed to convict an individual, to ipso facto infer that the Senate should not convict that same individual on an impeachment article or articles brought by the other body.

I supported article IV of the Impeachment Resolution because I believed it obvious that Judge Claiborne had betrayed the trust of the people of the United States by falsifying his tax returns and had reduced confidence in the integrity and impartiality of the judiciary, which therefore brings disrepute on the Federal courts and their ability to administer justice. This violated his oath of office and for that I thought he should be removed from office.

I think that all Senators and all citizens need to focus on the bottom line of this proceeding. If Judge Claiborne had been found not guilty on these charges of filing false tax returns it would have made a mockery of every citizen's legal duty and civic obligation to pay his taxes.

When Judge Claiborne stood here in the well before this assembled body he spoke for 35 minutes to a still Chamber. Yet in those 35 minutes he did not respond to the critical charges that had been made to him by the managers of the House of Representatives who sat also in the well of the Chamber. Judge Claiborne's comments did not go to the gravamen of the charges that had been made against him in Articles of Impeachment brought by the other House.

Instead he told us that he had been a "fair" judge.

All judges are expected to be fair.

He told the Senate and those listening in the galleries and those listening and watching on TV and radio that he had worked hard.

And yet all judges are expected to work hard. There is plenty for all to do.

He said that he was too busy, in other words, too busy to study the tax return.

I read from his statement directly from the record as to the 1979 tax returns. He said, "This is plainly a matter, in my opinion, that they did not believe my secretary."

In speaking of his 1980 returns he said that he had very little time for his personal business. "* * * I had very little time for my personal business, very little time. And I am not alone. I don't think there is a Federal judge in America on the bench that has time for his personal business. I can honestly state that I believe this, that Federal judges of this Nation are killing themselves. You cannot imagine the long hours they are working. You cannot imagine the time they spend on the bench. During recess, they are dictating orders or signing orders or reading briefs or preparing opinions, sustaining opinions. Then they go on the bench and try a case. They cut their lunch hours short, they stay at night and get into their offices sometimes as early as 6:30 a.m.

Mr. President, those words fell upon rather unsympathetic ears here in this Chamber. Senators are accustomed to working hard also. Also I suppose that there are a good many Senators who cut their lunch hours short, who work into the evenings. That is no excuse for not paying one's taxes.

No, he did not address the charges that had been made against him by the managers of the other body.

In those 35 minutes, he said, "I could not walk away because I have not violated a single law of the United States. I have not defrauded my Government. I have not been corrupt in my office."

Mr. President, there are few rather than many who, upon the commission of crimes, are willing to admit that they have violated the law. Most of them say they have not violated the law.

I was reading in the newspapers recently about the arrest of an individual who had just shot three or four police officers in the District of Columbia. When he was being carried away, he said, "I ain't done nothin'. I ain't done nothin'."

Even the hardest criminals, upon arrest, have often been known to say they have not violated any law.

Did G. Gordon Liddy say that he had violated any law in the Watergate episode? Did President Nixon say that he had violated any law when he resigned from that high office? Aaron Burr, who was the third Vice President of the United States, shot and killed Alexander Hamilton in a duel in July 1804. Murdered Hamilton. And yet Burr had the effrontery to come back, after fleeing to Georgia, come back to the Senate and preside over the Senate as though nothing had ever happened. Later he was tried for treason.

So often those who commit crimes will say that they "never violated the law."

We heard that mournful plea as we sat here yesterday and listened to the judge. But the facts, Mr. President, in the case did not and do not support his contention. He was found guilty by a Federal district court. A special three-judge panel of judges, named by the Chief Justice of the United States, confirmed the judgment of the district court by a vote of three to nothing. And then Judge Claiborne asked the entire Ninth Circuit to sit en banc for a rehearing of his case. I am told that there are 25 members within that circuit. Six of them recused themselves and of the remaining 19, 16 voted to deny the rehearing. Only 3 dissented.

And then Judge Claiborne petitioned for a writ of certiorari to the Supreme Court of the United States, and that was denied.

He then went to the penitentiary and began serving his time. He refused to resign from the high office to which he had been appointed by the President of the United States and for which he had once been confirmed by the Senate of the United States.

Then he came here to this Chamber. The House of Representatives impeached him and he appeared before the bar of the Senate, saying that he had violated no law; saying that he had not defrauded his Government; saying that he had not been corrupt in his office; saying that "I did nothing, I don't think, that the average American citizen does."

Mr. President, the average American citizen is not a Federal judge and the average American citizen just does not know what it is to file a tax return with an income of roughly $356,000, I believe it was, in one year—$54,500 salary as a district judge, almost $88,000 in legal fees, $214,000 in capital gains. And he filed a return claiming that the Government owed him almost $22,000. The average citizen does not have an income of that size.

Mr. President, I believe, as most Senators did, that Judge Claiborne was guilty. He was a convicted felon serving in a penitentiary in Alabama. He continued to draw his salary of a Federal district judge, $78,700 a year. He refused to resign from office. I voted to remove him from office and strip him, strip him of that salary which he did not deserve and which came out of the pockets of the honest taxpayers of this country.

Mr. President, the Senate fulfilled its responsibility under the Constitution. I again wish to compliment the committee of Senators, bipartisan in its makeup, Republican and Democrat, who belabored so dutifully and so faithfully in hearing the evidence, taking the testimony, compiling the facts, and submitting the report to the Senate. They worked diligently and faithfully, and they did their work well.

I hope that this example will be a lesson and I would hope that that lesson might not be lost on not only Federal judges but also all other officials in high places in our country.

On yesterday, I asked unanimous consent that my two statements that were made during the course of the closed sessions of the Senate on yesterday and the day before, appear in the public record. I now include, at the conclusion of these remarks, those two statements excerpted from the closed record and they will hereafter appear in the public record.

The statements follow:

REMARKS OF WEDNESDAY, OCTOBER 8, 1986

Mr. BYRD. Mr. President, I do not think that the respondent should be permitted to go away and say that the Senate did not vote on the substance of his motions. At the same time, I do not think the Senate has to accept his language. It is very cleverly crafted, "a full and fair trial."

Shortly, I shall ask unanimous consent to set aside this motion and have the Chair put before the Senate a motion which contains the substance of the respondent's request, to is it; one, that rule XI of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials is unconstitutional; and, two, that the Senate issue subpoenas to, and hear the testimony of in open Senate, the witnesses listed in Judge Claiborne's application for issuance of subpoenas.

Now that motion would contain the substance of Judge Claiborne's request, stripped, stripped of the overblown rhetoric. I think that the Senate is required to do no more than that.

Mr. President, while I am on my feet, let me address the substance of the respondent's motion. Actually, as I see it, it would be divided in two parts. But in the second part, it is so worded as to include not only those witnesses who were called before the committee but also the additional witnesses that Judge Claiborne is requesting in the memo that is at the bar.

Mr. President, first of all, I hope that we will keep in mind that the Senate is not sitting as a court of law. Second, we should keep in mind that our responsibility is to focus on, and render judgments with respect to the Articles of Impeachment that have been presented to the Senate by the House managers.

Now, as to the respondent's contention that rule XI is unconstitutional, let us go to the Constitution. The Constitution, in section 5, paragraph 2, of article I, says, "Each house may determine the rules of its proceedings." Every Senator knows that. Every Senator knows that this Senate can constitute a committee to take evidence, to take testimony, and to report back to the Senate in respect to the impeachment involving the respondent. It was done in impeachment cases heretofore, and Senators need only look in the little book "Procedure and Guidelines for Impeachment Trials in the United States Senate" and they will find such instances on page 43, for example:

"In the trial of Judge Peck in 1830, following the impeachment at the bar of the Senate by two members of the House of Representatives, the Senate proceeded to consider the message from the House and resolved:

That it be referred to a select committee, to consist of three members, to consider and report thereon."

Another case, in the case of Judge Archbald, in 1912:

. . . following the reading of the articles of impeachment and in order that they be printed by the Senate, the articles were referred to a special committee appointed by the President pro tempore, pursuant to a resolution as follows:

"*Resolved,* That the message of the House of Representatives relating to the impeachment of Robert W. Archbald be referred to a select committee, to consist of five Senators, to be appointed by the President pro tempore."

And it goes on to state the names of the Senators who were appointed.

So, in the one case it was referred to a "select" committee and in another instance to a "special" committee. Ergo, the Senate clearly has that power. It has exercised such powers before, and there is no question but that it is constitutional.

So much for that part of the respondent's motion. What the respondent is really asking for here is another trial. That is what the respondent is asking for, a full trial in open Senate. Actually the respondent has already gone a long way toward getting a new and full trial because under rule XI, I will read this extract therefrom.

"The evidence so received and the testimony so taken shall be considered for all intents and purposes subject to the right of the Senate to determine competency, relevancy, and materiality as having been received and taken before the Senate—

Before the Senate—

but nothing herein shall prevent the Senate . . .—

Ellipsis—

from having the entire trial in open session.

So, the testimony and the material reported by the committee to the Senate in 2,300 pages, and four volumes "shall be considered for all intents and purposes as having been received and taken before the Senate."

The respondent had his case considered in the Federal District Court, and he was found guilty of income tax evasion. Thereafter, an appellate tribunal made up of three judges was appointed by the Chief Justice of the United States to hear the case on appeal. That special tribunal confirmed the decision of the lower court, three to nothing.

The respondent then petitioned for the entire Ninth District Court of Appeals sitting en banc to rehear the case. I am told that there are 25 judges in the ninth circuit. Six of them recused themselves, leaving 19. Of the 19, 16 rejected the petition for rehearing. Three dissented, not meaning necessarily that they thought that the respondent was not guilty, but simply meaning that they felt there should be a rehearing. Then there was the petition for the writ of certiorari which went all the way to the Supreme Court of the United States, and that was rejected.

Hence, the respondent has had his day in court. The district court, the special three-judge appellate panel, the ninth district Appeals Court en banc, the Supreme Court of the United States. Now, he seeks to make the U.S. Senate a super Supreme Court.

I listened to his speech yesterday. I listened to his attorney's speech. I did not hear one thing said that would destroy or was even directed to destroy the case that was made by the managers of the House. And with specific reference to the 1980 tax return, it was said that "like the average American citizen," Judge Claiborne relied on his tax reporter. "I don't think the average citizen goes home and makes a personal audit," it was said. Mr. President, Judge Claiborne is not the "average" citizen. He is a learned man, learned in the law. He is a Federal judge. He has conducted trials of tax cases. He is not the "average citizen". What we are talking about in that particular instance of 1980 was income amounting to $356,400 in 1 year. The "average citizen" does not know anything about that kind of income.

Why did Judge Claiborne not resign when sent to prison, rather than risk impeachment? One might say, why is the judge coming to the U.S. Senate? My opinion is, that he felt he would have two out of three chances of winning. The odds are 2 to 1 here, because it requires a two-thirds vote to declare him guilty of the Articles of Impeachment. So it is a gamble for him.

Should the Senate then accord him a full trial in open Senate? I would hope that the Senate would reject this part of the respondent's motion also.

The special committee was appointed by the majority and minority leaders, using great care, may I say. And the members of that select committee applied themselves studiously. They dutifully attended the meetings. They sat for hours, daily; and they sat for days. They were thorough. In my judgment, they bent over backwards, as they should have done. I think the record is clear that they did that. I think they reflect, and I think the Senate can look with great pride upon their work.

Now, to say that after the respondent has had his case tried in all of the long judicial chain that constitutes legal due process, and then that he should come in here, and that this Senate should accord him what amounts to a new trial in open Senate, it seems to me as going very far. Too far.

Let me just point out another thing to my colleagues. I have read the post-trial brief of the House of Representatives, a blue-backed little booklet. It has only 59 pages in it. In this booklet, I found that in connection with the 1980 tax return, the judge had earned a judicial salary of $54,500 in 1980. He had judicial fees amounting to $87,900. He had a capital gains—on property that he sold for $750,000—of $214,000. His tax return states that he owed the Government only $1,103. Actually, his return declared that the Government owed him $20,900-plus.

He actually got a return of something like $44,000. There were other items. But on his return he claimed that the Government owed him almost $21,000. So Judge Claiborne had a total of $356,000 in income, including capital gains, and, yet, he claimed that the Government owed him almost $21,000.

It is beyond this Senator's ability to imagine that that learned man would not know from that kind of income and that kind of claimed repayment that something was wrong with his tax return.

What about his tax preparer? The judge employed an individual who had not more than a high school education. That is all right. There may have been Presidents who did not have more than a high school education. But this man also had a questionable reputation. He had been fired. He was not a certified tax preparer. But they discussed a scheme, if we are to believe this document, which was prepared by the House of Representatives. They discussed a scheme. The judge had been told that he would be liable for a considerable amount of taxes. As I recall, I think he was told that he would probably owe between $90,000 and $100,000 for that year.

They discussed a scheme in which the following "transaction" took place: they took the judge's legal practice. There was no cost price for the practice. He had built it up over the years. No cost basis for it. They took this practice which had already been written off in 1978. The cost of the library, the cost of the fixed equipment, the cost of the leasehold improvements had been written off, and the judge had recovered in full in 1978. Yet, they came up with this scheme by which they would estimate the cost of this legal practice at $250,000.

Then they established a phony sales price for it of $150,000, so that out of this bogus transaction, the respondent took a loss of $100,000. A $100,000 loss on a transaction that never occurred.

Of course, the $150,000 "sales price" covered the $87,900 legal fees for 1980, plus $40,000 for the next year and about the same for the following year. The judge had 1980, 1981, and 1982 covered in that bogus sales price.

It is beyond the very limited stretches of my imagination and credulity to believe that a Federal judge of this standing, a man with this experience, a man as learned as this man was, would enter into a scheme such as this and sign a return and accept the check, the figures being as I have already set forth.

I say all of this to say that I hope that the Senate will reject this motion for a full trial in open Senate.

As to the request that the Senate proceed now to issue subpoenas and hear the testimony in open Senate of all these witnesses, I hope the Senate will not stultify itself by going through such an extended and unnecessary exercise. Take a look at the facts as shown in this brief. I did not write the brief. This is a post-trial brief. I did not write it. I can only read it. It was prepared by the House. I accept it as being factual. There were those who were present in the hearings and they, of course, have their own viewpoints.

I urge the Senate to reject this motion.

REMARKS OF THURSDAY, OCTOBER 9, 1986

Mr. **BYRD**. Mr. President, I have listened through most of this debate here on the floor. I have reflected with pride on the attendance throughout most of the debate here of Senators on both sides of the aisle. I have commended and I commend again the committee of 12 that was appointed by the distinguished majority leader and by me under the resolution adopted by the full Senate.

I have listened to those who have said, as they have searched their consciences and their hearts, that they would like to see Judge Claiborne appear before the Senate and answer questions. Yes, they can read the record, they say, that has been prepared and submitted to the Senate by the committee, but they would like to have seen Judge Claiborne as he answered the questions; they would like to have observed his demeanor.

Mr. President, as has already been said, one may observe the judge's demeanor by looking at the video tapes that are available and have been available. But, Mr. President, I observe the demeanor of Judge Claiborne when he was before the Senate yesterday. He stood right here in the well of this Senate and he talked for 30 minutes. He needed more time. The distinguished Senator from Maryland, Mr. Mathias, asked unanimous consent and gave Mr. Claiborne an additional 5 minutes. The managers on the part of the House presented their case here in open Senate before the eyes of millions throughout this country.

When it came Judge Claiborne's time to respond, did he respond to the charges that had been made by the managers on the part of the House? Well, no. He had his chance. But he did not respond. What did he say? He said, "I have been fair." Well, what judge would expect to be otherwise than fair? He said, "I have worked hard." Well, what judge would be expected not to work hard? He talked about how the Federal judges are overworked, how they go without lunch, how they work into the evenings, and how they are killing themselves. But did he answer the question? Did he go to the gravamen of the charges that had been made? No. With respect to the 1979 return, here is what he said. "This is plainly a matter, in my opinion, that they did not believe my secretary." That is about all he said about the 1979 return.

On the 1980 returns, what did he say? He said:

"Mind you, the only thing the Government was charging me with on the 1980 return is that I did not declare fees that I collected in the amount of $88,500.

"Mr. Watson's office had treated the $88,500 on a schedule D, which my accountant when he performed my audit after I was indicted said he can't do that. We conceded that he did it incorrectly. But I did not catch that it was done incorrectly. He told me that it was correct.

"When it began to look like I was going to be indicted, I talked to him. I said, 'I want to know how you did it. I want to know exactly what you did.'

Let me read that again from yesterday's transcript:

"When it began to look like I was going to be indicted"—

Aha—the hour was late.

"When it began to look like I was going to be indicted, I talked to him. I said, "I want to know how you did it. I want to know exactly what you did."

Then, the judge said to Watson,

"Can you support that?"

And then Watson, who prepared the tax return, said,

"Yes. * * * Judge, I have taken your return to two IRS agents, both of whom I trust and have great confidence in their ability. Both of them have told me, * * * 'that your tax return was done correctly.' That reassured me. That reassured me."

Now that is the sum and substance of what Judge Claiborne had to say in answer to the critical charges made against him by the managers on the part of the House. All of the rest of the time he talked about how fair he had been, how hard he had worked, and how he wanted to retrieve his good name. But not once did he go to the gravamen, to the center, to the heart of the charges. Not once did he explain the bogus scheme by which the phoney sale of assets had been created in a transaction that had never occurred.

I will not go further into that. I spoke on those things briefly yesterday, and I need not say anything further in that regard.

But let me say to my colleagues we are approaching the hour when we will vote. Not very long ago the Congress of the United States passed a far-reaching tax bill, and its purpose was to make the Tax Code fair. Its purpose was to wipe out the loopholes, to tear down the tax shelters, and to instill confidence in the tax system on the part of the American people.

Now we are about to cast a vote on whether Judge Claiborne should be removed from office. Are we to say that this man is not guilty of tax evasion because he was too busy? Every Senator here knows that every Senator is also busy, but every Senator is also expected to pay his taxes, and we cannot get by with saying we are too busy. Are we going to send a signal that there is to be a double standard—one for Federal judges, and another for other taxpayers?

What are we going to say to that widow out there who is working day and night to pay her bills, to buy clothes for her children, to put her kids through school? How are we going to answer her when she says "I pay my taxes. Why did you vote to let this judge be acquitted on the Articles of Impeachment brought against him for tax evasion?"

What am I going to say to that coal miner in West Virginia? Talk about somebody who works hard. Somebody who has to go into the bowels of the Earth, hear the mountains groaning over his head, hear the timbers cracking to the right and to the left of him, and who pays his taxes on the money that he earns in the sweat of his brow? How am I going to look him in the face and say, "Well, the judge was too busy. He just took his accountant's word. He is a busy man, you know. He has sometimes worked a little bit at lunchtime. Sometimes he has to go back and work a little in the evening."

That coal miner does not have money to invest in apartments or horses as Judge Claiborne did, in Mexico or anywhere else. How am I going to answer him? What are we going to do to the confidence of our people in our tax system if we vote to aquit this man? He has had his chance. I saw his demeanor. And if he were back here before the Senate another hour, another day, how would I still answer that coal miner or that poor widow or that black who is toiling in the factories of the country, in the fields of the West or South, and of the North,

I ask for 2 more minutes.

Mr. **Mathias**. I yield 2 more minutes.

Mr. **Byrd**. How would we answer those who are justly toiling, who believe that they have a duty to pay their taxes, and who want to live up to the laws of the land, and are doing their best to do it? How can we then say to them, "Well, we judge him by a different standard"? I cannot do it, Mr. President.

I have seen the judge. I have seen his demeanor. I saw him take 35 minutes here in the well of the Senate, and appeal to those watching and listening out there on TV and radio and those in here in this Chamber. What did he say? Nothing to explain his defense against the charges; only that he believed his accountant, and that he was busy, too busy.

Mr. President, each Senator must do his duty according to his own lights, each according to his own conscience, and each Senator wants to be fair. Each Senator wants to live up to his own oath to uphold the Constitution. I have said all I will. Judge Clairborne has had his day in court. He has run through the line of due process. And he has had his day before the U.S. Senate.

I will vote "guilty" on three of the four articles: I, II, and IV.

STATEMENT OF SENATOR TED STEVENS

Mr. **Stevens**. Mr. President, I ask unanimous consent that the statement I made in relation to the impeachment proceedings concerning Judge Claiborne appear similarly in the Record following those of my distinguished friend from West Virginia.

There being no objection, the statement was ordered to be printed in the Record, as follows:

STATEMENT OF SENATOR STEVENS DURING CLOSED SESSION

Mr. **Stevens**. Mr. President, on Tuesday the Senate sat as a court of impeachment for the first time in a half century. As a former U.S. attorney with substantial experience as a prosecutor, I have serious misgivings about the circumstances under which the impeachment trial of Judge Harry E. Claiborne has been conducted.

The Constitution clearly indicates that the impeachment process is a unique congressional function and is not intended to serve as a substitute for our criminal law process. That fact adds great weight to the argument that the Senate is not bound by all the rules of American criminal law when it sits as we are now, as a court of impeachment. It does not, however, mean that an impeachment trial is a proceeding of less significance and dignity than a criminal trial.

No court of the United States can remove a Federal judge from office, no matter how heinous his or her crime. The Constitution reserves that extraordinary power to Congress. As we know, upon receiving a message that the House of Representatives has approved articles of impeachment against an individual, the Senate is charged by the Constitution with the task of examining the articles and passing judgment on them without regard to determinations that may, or may not, have been made by the judicial branch of the Federal Government.

If the Senate fails to try the charges made against Harry Claiborne by the House of Representatives as an independent legislative court, it will frustrate the intent of the Framers of the Constitution. I do not believe we should allow the impeachment process to deteriorate into a second-rate criminal appeals process.

To be absolutely frank, Mr. President, I do not believe that Members of this Senate have had enough time to weigh independently the evidence that has been presented in the Claiborne trial.

I make this statement because I know I have not had the time to do so. I have been asked to represent the Senate in conference with the House, and I have been present on the floor of the Senate for no more than 35 minutes out of this trial to date.

Those of us who are members of the Appropriations Committee have been presented with a choice between doing the task assigned to us as Members of the Senate in a conference with the House that will determine when this session of Congress will conclude or absenting ourselves there and coming here to listen to this trial. Many of us have pleaded for some way to have time to go through the evidence at least once.

I do not know about the rest of the Members of the Senate, but I was in conference late into the evening on Tuesday and Wednesday. After the conference I spent the rest of my waking hours going through appropriations materials to prepare for the conference on the defense appropriations bill the next day.

I am not criticizing anyone here in the Senate. The extreme pressures we all encounter during the last few weeks of any Congress are simply not conducive to being a part of the impeachment trial process. I take this process very seriously as a Member of the Senate and as someone who has spent a total of almost 40 years in the practice of law and the making of laws.

Since this is the will of the Senate to finish consideration of the charges pending against Judge Claiborne before we adjourn this month, I intend to take the circumstances under which the impeachment trial was conducted into account, as far as I am concerned in deciding how to vote on the articles of impeachment. In my opinion, the burden is on the House managers to demonstrate that these circumstances have not fatally flawed the Senate's consideration of the articles of impeachment. Let us not forget that the timing of the presentation of these articles was decided by the House, not the Senate.

There was no reason for the delay in the approval and presentation of the articles of impeachment, which has forced the Senate to conduct an impeachment trial in the last month of a 2-year Congress.

I hope no one misconstrues my comments. I commend the majority and minority leaders for their efforts to prepare us for the impeachment trial. I have gone through the booklet prepared under their supervision, and it is a very good booklet, an historic document, as a matter of fact, in terms of providing guidelines for the conduct of this trial.

I think the distinguished chairman and vice chairman of the impeachment trial committee have done an excellent job in preparing the record of this trial for our consideration. I sincerely regret that I have not been able to find time to read through even the first volume, let alone the volumes as a whole.

Mr. President, the problems I have identified are not the problems of any individual. They are the product of timing factors beyond the control of any Senator.

I am making this statement to indicate the total frustration of this Senator in attempting to deal with this trial process responsibly, and at the same time, deliver back to the Senate floor by midnight tomorrow, as I have been instructed to do, the defense appropriations bill, the largest of the 13 appropriations bills. Mr. President, it is impossible to do both jobs at the same time, and it is unfair to place such a burden on Senators and on the accused. Unless somebody corrects this unfairness, I shall vote "present" on every charge against Judge Claiborne because as a juror, I have not been able to participate fully in the trial process.

STATEMENT OF SENATOR SPARK MATSUNAGA

Mr. **Byrd**. Mr. President, I ask this at Mr. Matsunaga's request. I ask unanimous consent that his statement made during the closed session anent the impeachment of Judge Harry Claiborne appear in the Record of today.

There being no objection, the statement was ordered to be printed in the Record, as follows:

STATEMENT OF SENATOR MATSUNAGA DURING CLOSED SESSION ON THE IMPEACHMENT OF JUDGE CLAIBORNE

Mr. MATSUNAGA. Mr. President, I sat here listening to the arguments presented on both sides. I came here unprepared to vote either way. As one who served as a public prosecutor back home for 2½ years and subsequently who served as defense counsel in criminal cases, as well, I came here fully prepared to listen to the evidence, read whatever evidence was presented to the committee of 12, and to make up my mind only after all the evidence has been in.

This is my first experience serving as a juror. What disturbs me most, after listening to what has been said on this floor, is that members of the panel have indicated that they are prepared to find the respondent guilty on article III simply because the respondent was found guilty in a court of law. Now, that violates our basic tenet, our basic concept of three separate and independent branches of Government.

We must serve as a check on the other two branches of Government. That is what the three independent branches of Government were set up for, as checks and balances. And we will have destroyed that by ruling or by deciding on article III. We should completely disregard article III and proceed, if we must, on articles I, II, and IV. And I urge my colleagues not to take article III into consideration at all.

Now, we have this difficulty also: Supposing the respondent's petition for trial de novo is granted and suppose, also, that he is then found not guilty. Had we proceeded to impeach him on article III, where are we then?

So I urge my colleagues, do not proceed on the basis of article III. If you need to go, go on articles I, II, and IV, and that is what I intend to do. I am prepared to proceed on articles I, II, and IV, although I am not prepared yet at this time to determine, to declare, whether I find him guilty or not guilty. I will wait until all the arguments have been made and I have listened to the arguments and I have satisfied myself that without a doubt I am making the right decision.

STATEMENT OF SENATOR GEORGE J. MITCHELL

Mr. MITCHELL. Mr. President, it is my understanding that by unanimous consent permission has been granted to Members of the Senate to have printed in the Record statements made during the closed debate on the impeachment of Judge Claiborne.

The **PRESIDING OFFICER.** The Senator is correct.

Mr. MITCHELL. Mr. President, pursuant to that understanding, I ask unanimous consent that the full text of the statement that I made during debate on the Articles of Impeachment on yesterday Thursday, October 9, be printed in the Record.

There being no objection, the statement was ordered to be printed in the Record, as follows:

STATEMENT OF SENATOR MITCHELL ON IMPEACHMENT

Mr. MITCHELL. Mr. President, I think it is important that as we vote on the Articles of Impeachment that we first have clearly in mind what impeachment is and what it is not. Simply put, all that conviction on impeachment means is removal from Federal office. It does not take the place of a judicial proceeding, nor does it preclude a judicial proceeding. Impeachment is a political action in the sense that it is the only means by which certain high Federal officials may be removed from office.

It is essentially a discipline. The impeachment authority is limited. It has great moral force which it gains from its rarity, not from its severity.

So all we are talking about is whether or not Judge Claiborne will be removed from his office as a Federal judge. We have no power other than that.

The question then is whether or not the Articles of Impeachment presented by the House constitute an adequate ground on which to remove Judge Claiborne from office.

The record in this case, which includes the testimony of witnesses called by Judge Claiborne in a lengthy proceeding before the special committee, is available to every Member of the Senate, both in printed form and on video. An examination of that record reveals to me that Judge Claiborne has presented no substantial evidence to cast doubt upon the case against him.

The facts have been so extensively discussed here during this debate that I will not repeat them in detail. I will focus instead just on the one year of 1980 when Judge Claiborne received his judicial salary of $54,000, plus fee income of over $87,000, plus a taxable gain on the sale of his home in excess of $214,000. He was told, and he has admitted that he was told, that he faced a tax liability of over $97,000 for that year. He signed and filed an application to extend the time for filing his tax return in which he estimated that his tax liability would be almost $44,000. Yet, a few weeks later he signed a tax return and paid a tax of $1,103.

Members of the Senate, every American jury hearing a criminal case is instructed by the trial judge not to leave their common sense outside the courtroom when they enter it. And I urge the Members of the Senate not to leave their common sense outside this Senate Chamber when they consider this case.

Here was a man, a lawyer, a skilled trial lawyer, a skilled tax trial lawyer, a Federal judge who had presided over tax trials, who had instructed juries on what the tax laws mean, having income well in excess of $300,000, having been told that his tax liability would be about $97,000, having filed an application for an extension of time in which he said he expected his tax liability to be $44,000, and then he filed a tax return and paid a tax of $1,103. Leave aside every other aspect of your judgment other than common sense, and ask yourselves whether or not that does not constitute willful violation of the tax laws of this country.

There has been a lot of talk here about willfulness as though somehow the Members of the Senate expect some evidence to come forth from the judge himself establishing his willfulness.

But I say to you that willfulness is an element in virtually every criminal trial. It is proven by circumstantial evidence. It is inferred from other facts.

I think what we have had here is a clear case and nothing in the record justifies our reversing the conclusion of the juries which tried and convicted Judge Claiborne. He has not rebutted the charges against him, even though he had ample opportunities to do so.

In their presentation in this Senate Chamber, the House managers were explicit in setting forth the charges against Judge Claiborne. He spoke after them. He could have responded to their charges. He chose not to do so.

The issue here is not whether there is hostility toward Judge Claiborne in the Justice Department or the strike force. I favor an investigation by an appropriate committee. But that is not the issue. What is at issue is whether or not Judge Claiborne violated the criminal laws of this country when he signed and filed his tax returns in 1979 and 1980. To me, the answer is as clear as it is regrettable.

I am convinced that Judge Harry Claiborne knowingly and willfully committed the crimes for which he was convicted.

Let me say, those are the most difficult words I have had to speak since entering the Senate. The proudest moment of my life was when I was sworn in as a Federal Judge. It is an honor that is difficult to put into words. But with that honor comes a commensurate responsibility. Those persons who are invested with the awesome power to pass judgments on their fellow citizens must themselves adhere to the highest standards. Otherwise, public respect and support for our judicial system will collapse.

I was and I am proud of my association with Federal judges.

I never met Judge Claiborne, but I want to say that I began these proceedings with a considerable amount of sympathy for him. But that sympathy has given way to the facts, and to me the facts are clear.

We have heard the argument that he was entitled to an audit. There is no such right. That is not the issue.

The issue is whether the proper payment of taxes due under the laws of this country is an obligation of all citizens, including Federal judges, and whether the failure to fulfill that obligation constitutes a sufficient basis to remove a judge from office.

Many people have said taxes are the price we pay for civilization. I say Government financed by taxes is the price we pay for civilization. Without Government, society could not function. Without Government, every individual, every family, would exist in a state that would be at best chaotic and most brutal. Many of the functions of Government are questionable. Most are controversial. We spend much time in this Senate debating what our Government should or should not do. But the most fundamental function of Government, the one on which there is no disagreement, is that Government must administer justice in our society.

Our courts are the means by which justice is administered in this country, and the individuals presiding have an obligation to fulfill that function which is the most minimally essential to an ordered life, the upholding of the law. In American life, law owes its authority almost entirely to its integrity. If that integrity is gone, so is the law.

A convicted felon simply cannot sit as a Federal judge. I repeat that, a convicted felon cannot be permitted to sit as a Federal judge. It would totally undermine respect for law and authority in our country.

We simply have to recognize that and do what we must do. It is a very, very difficult vote. It is a very difficult thing for me, a former Federal judge, to say these words about another Federal judge. But when we entered the Senate, we swore an oath to do our duty, and hard as it may be, unpleasant as it may be, that is our duty.

I urge the Members of the Senate to vote for conviction of impeachment. The record is clear. I believe the judge is guilty of the crimes for which he has been convicted, and for the respect that our Nation must maintain for the judicial branch of Government he must be removed from office by this Senate. I thank the Chair.

[Congressional Record—October 14, 1986—S 16241]

STATEMENT OF SENATOR MITCH McCONNELL

Mr. McCONNELL. Mr. President, I would like to give some explanation for the manner in which I have cast my vote to convict Judge Harry E. Claiborne in this Senate Court of Impeachment. I will, therefore, briefly discuss each of the articles and my vote on each. Before I do so, however, I would like to address an issue which has haunted this impeachment proceeding since its inception.

Time after time during the evidence gathering sessions of the Senate Impeachment Trial Committee, of which I was a member, Judge Claiborne's counsel alleged that Claiborne's conviction of tax fraud was the direct result of prosecutorial and judicial misconduct. The defense stated that Judge Claiborne was the target of a sting, that he was stalked day and night by Government agents, that local FBI agents actively sought to "get him", and that this conspiracy involved not only Nevadan law enforcement officials but extended to the highest offices of the land. Time and time again Judge Claiborne's counsel strained against the limits established by the committee to seek and admit evidence of wrongdoing on the part of these officials. The implication he gave suggested that if only one more witness were called or one more piece of evidence were admitted, the clouds would part and the Senate would see that, indeed, Claiborne was guilty of no wrongdoing. And that only the IRS, the Justice Department, or some other Government agency had acted in an egregiously improper manner.

This impeachment proceeding sought to determine the wrongdoing of only one man—Judge Harry E. Claiborne. The evidence presented before the Impeachment Committee and the Senate was ample to prove his culpability. Any allegations of wrongdoing on the part of Government agents, and I will admit that some evidence of such activity was disturbing to me, was extraneous and fundamentally irrelevant to this proceeding. Nevertheless, the committee allowed Claiborne's counsel wide latitude in presenting evidence of prosecutorial misconduct to the extent such misconduct shaped testimony or tampered with exhibits. In sum, then, the Senate has heard all available evidence of misconduct on the part of Government agents to the extent such evidence is the least bit relevant to the issue at hand—the fitness of Judge Claiborne for office.

As just mentioned, however, I am disturbed by the allegations of prosecutorial targeting in the case of then Judge Claiborne. I am concerned about the possible over-zealousness on the part of Justice Department, strike force, and IRS agents. Although our common law has traditionally granted prosecutors wide discretion in who and how they prosecute, that discretion surely has its limits. The prosecution of Harry Claiborne, I feel, may have been at the outer limits of that discretion. Consequently, I support the establishment of a special ivestigatory committee which will inquire into allegations of IRS and Federal strike force improprieties. If those charged to enforce laws fail to observe them scrupulously, the future of our Government of laws is imperiled. This unique committee will investigate and report on these law enforcement activities not only in the case of Judge Claiborne, but in cases nationwide. The fruit of this investigation will either put these allegations to rest as baseless or clearly reveal improprieties and allow for their correction.

I voted guilty on articles I and II for the simple reason that the record clearly established Claiborne's fraud for the 1979 and 1980 tax years. Without reciting all the facts before the Senate for its consideration, I felt the following facts for the 1979 tax year important for showing Claiborne's intent to defraud. First, Judge Claiborne gave his accountant preparing his tax return only his bank statements knowing full well that those bank statements would not reflect several large check payments Claiborne received which he had cashed in casinos. Second, Judge Claiborne for the first time in his life started cashing checks at casinos, where the income could not be easily recorded, rather than at banks. Third, only 19 days after tallying up his legal income of approximately $45,000 for 1979 and sending that figure to his accountant, Judge Claiborne failed to correct his accountant when he unknowingly read back to Claiborne the incorrect sum of appoximately $22,000 as legal income for that year.

The facts are more damaging for 1980. First, Judge Claiborne dropped his accountant (and friend) of many years, refusing even to return the accountant's several inquiring telephone calls. Second, the tax return was so incompetently completed that it could not have failed to raise questions in Claiborne's mind. Third, even after a discussion with his accountant about the unorthodox and unauthorized manner in which ordinary and capital income was treated on the return, Claiborne did not attempt to vitiate the return. Fourth, Claiborne showed no alarm that the return showed a tax liability of only $1,103 for a year in which he earned about $85,000 in legal fees, $54,000 in his judicial salary, and he acquired a $214,000 gain in the sale of his home.

These facts were decisive in my mind in judging Judge Claiborne's state of mind during the tax years of 1979 and 1980. They prove to me that through a combination of active concealment and passive reliance on the incompetence of others Judge Claiborne sought to defraud the U.S. Government of lawful tax payments.

I did not find Judge Claiborne guilty under article III, I did not find so principally because conviction under that article would connote an improper reliance by the Senate on the judicial system when it determines impeachable offenses. The Constitution grants the Senate the sole power to try impeachment cases. The Senate has great discretion in deciding exactly how it will try a particular case, including perhaps a decision to rely on the transcript of a previous judicial trial. However, I feel it would abrogate its constitutional duty if the Senate were to rely solely on a judicial judgment to convict, in turn, in a Senate impeachment trial. Further, this kind of reliance on a court decision may establish a crippling precedent should the Senate find itself trying a judge or other Federal official concerning some wrongdoing for which the courts have previously acquitted the official. This possibility is quite real. A Federal judge was recently acquitted of bribery charges in a criminal trial. However, the judges' governing body is preparing to request the House of Representatives to draw up articles of impeachment against this judge. In refusing to vote guilty on article III, I sought to avoid tying my hands and those of the Senate when the time comes again that the Senate sits as a Court of Impeachment.

Article IV alleged that Judge Claiborne brought disrepute upon the Federal Judiciary by defrauding the Government and by his consequential imprisonment. The obviousness of this allegation required me to vote guilty. Our Federal Judiciary is nothing if it is not an esteemed and respected branch of Government. Having control of neither the purse not the sword, our judges rule by the power of their wisdom and the respect due their integrity. Indeed, the Judicial Code of Ethics rightly admonishes judges to avoid even the appearance of impropriety. In the case of Judge Claiborne a jury of his peers convicted him of a felony charge relying on evidence which the Senate felt was ample to support such a conviction. A felony conviction goes well beyond the appearance of impropriety. Judge Claiborne's fraudulent acts generated notoriety. The reputation of our judicial system cannot tolerate this kind of wound through which the citizenry's good will will bleed. For this reason I voted Judge Claiborne guilty on the charge of Article IV.

[Congressional Record—October 15, 1986—S 16350]

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Mr. MATHIAS. Mr. President, Prof. Raoul Berger has observed that while impeachment in this country has been "largely a means for the ouster of corrupt judges," it was in England "the chief institution for the preservation of the government." R. Berger, "Impeachment: The Constitutional Problems" 1 (1973). In the 198 years since it first assembled in New York, the Senate has removed only five civil officers of the United States, all judges. While this supports the observation that impeachment in this country has been used narrowly, we must be mindful of the larger purpose, "the preservation of the government," that is served by the framers' decision to import this English institution into our national charter.

The framers did not specify the procedures which the Senate should use when trying impeachments, other than that the Senate shall have "the sole Power to try all Impeachments," that "[w]hen sitting for that Purpose, [Senators] shall be on Oath or Affirmation," that "[w]hen the President of the United States is tried, the Chief Justice shall preside," and that "no Person shall be convicted without the concurrence of two-thirds of the Members present." (U.S. Const., Art. I, sec. 3, cl. 6). Beyond these requirements, the

Constitution grants to the Senate discretion, through its authority to "determine the Rules of its Proceedings," (Art. I, sec. 5, cl. 2), to choose the means of implementing its impeachment trial responsibilities.

The Senate's impeachment procedures must serve three objectives. They must enable the Senate to determine if there is sufficient evidence to convict an officer of the United States of a high crime or misdemeanor. They must enable the officer to defend himself against the accusation of the House of Representatives. Finally, in adopting procedures to aid in "the preservation of the government," the Senate must be careful not to diminish its ability to perform the other functions of the government which it is seeking to preserve.

In the impeachment trial of Judge Harry E. Claiborne the Senate was called upon to consider the propriety of two procedures, one of which the Senate rejected and another of which it utilized. My purpose in addressing the Senate today is to examine these important decisions.

1. THE MOTION BY THE HOUSE FOR SUMMARY DISPOSITION OF THE THIRD ARTICLE OF IMPEACHMENT

The House exhibited four articles of impeachment. The first and second articles alleged that Judge Claiborne had willfully filed fraudulent tax returns for 1979 and 1980 which failed to report substantial income. The third article alleged that he had been convicted of those offenses in a U.S. district court. The Fourth Article alleged that Judge Claiborne's willful falsification of tax returns brought disrepute on the Federal courts and the administration of justice.

At the outset of the proceedings before the Impeachment Trial Committee, appointed by the Senate in accordance with impeachment rule XI, the House filed a motion for summary disposition of the Third Article of Impeachment. The House noted that Judge Claiborne had been convicted of two felony offenses, and asked "that the Senate recognize this judgment of conviction and determine that it is an adequate basis, under Article III of the Articles of Impeachment, for Judge Claiborne's conviction by the Senate and removal from office." (S. Hrg. No. 99-812, at 147-48). The House disavowed any intention, with respect to the third Article, to present proof of the commission of the underlying offenses. It stated that it would rest its case in support of the Third Article on the record of the trial and appellate proceedings in the criminal case. The House submitted the trial transcript solely "as evidence of the regularity of the proceedings." Id. at 149 n.2. The House urged the Senate to credit the final judgment of the judicial branch and not to make an independent determination of the facts.

The Impeachment Trial Committee lacked jurisdiction to rule on the House motion for summary disposition, and it referred the motion to the Senate at the conclusion of its hearings. The committee rejected the companion House motion which requested, in essence, that the committee desist from taking evidence and refer the House summary disposition immediately to the Senate. As chairman of the committee, I explained why I believed that the committee should not disturb the Senate's decision that the committee receive the parties' evidence on all of the articles prior to the Senate's consideration of their legal and factual merit.

In my ruling, I noted that the House argument, which was based heavily on principles of comity, the conservation of resources, and the avoidance of inconsistent results, might have been compelling if the Senate had been sitting simply as another court. The Senate, however, has the "sole" power to try all impeachments, and it has no authority to delegate that power to another branch. The evidence is that the framers deliberately constructed a system which would contemplate, in Alexander Hamilton's phrase, a "double prosecution." "The Federalist No. 65", at 429 (B. Wright ed. 1961). The separation of criminal and impeachment proceedings was designed, in Hamilton's further words, to provide impeached officials of the executive and judicial branches with "the double security intended them by a double trial," Id. at 428. The reverse side of double jeopardy. The need to separate criminal proceedings in the judicial branch from impeachment proceedings in the legislative branch is underscored by the Framers' rejection of a proposal to confer on the Supreme Court the power to try impeachments.

The third Article of Impeachment garnered the support of fewer than half of the 98 Members who were present for voting on the articles: 46 Members voted guilty, and 52 voted not guilty or not simply announced their presence. In this manner, the Senate convincingly recorded its conclusion that it should not delegate the impeachment function to the courts by making removal a further and automatic consequence of a criminal conviction. while we may hope that the courts will always be virtuous and correct in their judgments, our special function under the separation of powers does not permit us to reunite, in the judicial branch, powers which the framers thought should be separated.

2. SENATE IMPEACHMENT RULE XI

Members are now thoroughly familiar with the provisions of Senate impeachment rule XI. The rule authorizes the Presiding Officer to appoint, if the Senate so orders, a committee to take testimony in impeachment proceedings. Upon the committee's report to the Senate of a certified transcript of its proceedings, the testimonial and documentary evidence received by the committee is to be considered, to all intents and purposes, as having been received and taken before the Senate. The rule reserves to the Senate the right to determine the competency, relevancy, and materiality of this evidence. The rule also preserves the right of the Senate to send for any witness and hear that witness' testimony in open Senate, or by order of the Senate to have the entire trial in open Senate.

What may be less familiar to the Senate is the fact, which is demonstrated by rule XI's English antecedents and the Senate's prior impeachment experiences, that it is not novel for Senators to base their judgments in an impeachment trial on a written record of previously recorded testimony.

THE ENGLISH ANTECEDENTS

In 1916, in support of a proposal that the Senate consider alternatives to the taking of evidence in open Senate, Alexander Simpson, who had been one of Judge Robert Archbald's counsel at an impeachment trial several years earlier, cited as authority a passage in "Jefferson's Manual of Parliamentary Practice." See A. Simpson, "A Treatise on Federal Impeachments" 68. Jefferson had prepared the manual for his guidance as President of the Senate during his Vice Presidency from 1797 to 1801. On the subject of witnesses at impeachment trials, Jefferson, reflecting on English impeachment practice, wrote that:

> The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.

Constitution, Jefferson's Manual, and Rules of the House of Representatives," (H.R. Doc. No. 277, 98th Cong., 2d Sess., § 614, at 296 (1985)).

While the choice of impeachment procedures cannot be left exclusively to a study of English practice, the evidence appears to be that, at least for a period of time, committees were used in the House of Lords during the trials of impeachments. In 1620, for example, the House of Lords "appointed a select Committee of themselves, to take Examination of Witnesses" in the trial of Sir Francis Bacon. 2 T. Howell, "A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783" (1101 (1816)). The same year the House of Lords appointed a committee to examine witnesses in the trial of Dr. Theophilus Field, Bishop of Landaff. (Id. at 1116.) In 1621, the House of Lords examined witnesses in committees in the trial of Sir Giles Mompesson. (Id. at 1122–24.) Then, in 1624, depositions taken by a committee were read to the House as evidence of impeachment charges against Lord Treasurer Middlesex. (Id. at 1183; 3 H.L. Jour. 350, 352–61, 365.)

I have in my office several volumes of these reports of State Trials which came from an old Maryland law library where I believe they had been since before the Revolution. The Constitutional language "high crimes and misdemeanors" suggests that the Founders were familiar with these reports and presumably with the established practice of employing committees to take impeachment evidence.

The use of committees during impeachment trials in the House of Lords is documented in an article by Prof. Napoleon Williams, which he wrote in response to a brief suggestion to the contrary by Professor Berger. I ask unanimous consent that an excerpt from Professor Williams' article, "The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials," (50 N.Y.U. L. Rev. 512, 528–32 (1975)), be reprinted as an addendum to my statement today.

These English precedents indicate that, in utilizing Impeachment Rule XI, the Senate is not writing on a blank slate.

THE HISTORY OF RULE XI

While the Claiborne impeachment was the first Senate impeachment trial in which witnesses were examined before a committee and not on the Senate floor, rule XI is not a departure of the practice of receiving evidence through a printed record.

The initial suggestion that a Senate committee receive impeachment evidence was made in 1904 after the House had initiated an investigation of District Judge Charles Swayne. Senator George Hoar proposed an addition to the Senate's impeachment rules to require the Presiding Officer (except in an impeachment of the President or Vice President) to appoint a committee:

> To take all the testimony on both sides . . . [and] cause all the testimony by them heard to be reduced to writing and reported to the full Senate. 38 Cong. Rec. 3902 (1904)).

The resolution was referred to the Committee on Rules which took no action on it, and the Swayne impeachment trial proceeded in 1905 without the use of a committee.

The suggestion for a committee was renewed in 1912 during the impeachment trial of Circuit Judge Robert Archbald. Senator (later Justice) George Sutherland introduced a resolution to amend the impeachment rules to provide that in all subsequent impeachments, except when the President, the Vice President, a Cabinet member, or a Justice of the Supreme Court is being tried, testimony may be taken by the Judiciary Committee and reported to the Senate. Senator Sutherland compared this procedure to the "reference, in the case of a court of equity, to a master, and in the case of the Senate by reference to a special committee or to a standing committee." (49 Congressional Record 698 (1912).)

In the remarks to the Senate, Senator Sutherland paid special attention to the reality that at impeachment trials many Senators learn of all or portions of testimony through a written record rather than by direct observation of witnesses. He noted that because of other business of the Senate,

> [m]any of the Senators could not be present to hear the testimony.* * *

> Consequently, for those Senators

> Of necessity they are obliged to read [the testimony] before they can act. The same result, it seems to me, would be obtained by referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate.

The Senate did not act on Senator Sutherland's suggestion, but his idea and the idea enunciated earlier by Senator Hoar persisted. Several years after the Archbald impeachment, Alexander Simpson, who, as I have indicated, was one of Judge Archbald's counsel, suggested that impeachment evidence be taken by a committee or, preferably in Simpson's view, by U.S. judges, except when the President, Vice President, or a Supreme Court Justice is impeached. Simpson shared Senator Sutherland's observation about attendance during the Archbald trial: "[T]he thing that strikes a common law lawyer most is the few Senators who in fact listen to the evidence. During the Archbald Impeachment the membership of the Senate exceeded ninety, yet rarely over twenty members were present." A. Simpson, A Treatise on Federal Impeachment 67 (1916).

Simpson regretted that few Senators actually heard testimony directly, but he also expressed his understanding that, after periodic quorum calls during the trial, Senators would "return [move] from whence they came, leaving the Senate as bare as it had been before. While that result was, and in all such cases must be regretted, yet it is not so much to be wondered at. Most of the work of Congress must now be done by committees, and the Senator who really attends to that work, and is present at the important legislative sessions of the Senate, has all his official time fully occupied." Id.

The impeachment trial in 1933 of District Judge Harold Louderback brought again to the fore the problem of attendance at impeachment trials. Three years after the trial, Representative Hatton Sumners, chairman of the House Committee on the Judiciary and one of the managers at the trial recalled the scanty attendance of Senators, noting: "At one time only three Senators were present, and for 10 days we presented evidence to what was practically an empty Chamber." Impeachment No. 13, Time, March 16, 1936, at 19.

In reaction to the Louderback trial and at the urging of many Senators, Senator Henry Ashurst, the chairman of the Committee on the Judiciary, offered in 1934 the resolution which became Impeachment Rule XI following its adoption the next year. Senator Norris, who had experienced impeachment trials as a House manager in 1912 at the Archbald impeachment and as a Senator in 1933 at the Louderback impeachment, related to the Senate, as Senator Sutherland had done 20 years earlier, that most Senators in the final analysis would have to study the evidence in a printed record. In Senator Norris' words,

> I think the object of the resolution is to avoid what always takes place in an impeachment trial before the Senate. There are times when there is not a quorum in the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have to read the evidence in the RECORD in order to know what it is. 78 CONGRESSIONAL RECORD 9929 (1934).

The use of committees to receive evidence at impeachment trials is a matter, therefore, which has had the attention of thoughtful Senators in this century. In an ideal world we might all prefer that each Senator personally hear all impeachment evidence, just as we might prefer that each Senator personally hear witnesses to every matter bearing upon war or peace or other aspects of the Nation's welfare that we are called upon to consider. However, we are required of necessity to learn through the study of printed records about many of the important matters which compete for our attention.

THE USE OF RULE XI IN THIS IMPEACHMENT

Rule XI, of course, does not require the Senate to receive evidence through a committee nor does it foreclose the Senate, even after evidence has been received by a committee, from calling for some or all of the witnesses to testify in open Senate. The question in any particular impeachment is whether, based on the facts of that impeachment, the rule should be used or used exclusively.

The principal deficiency attributed to rule XI is the contention that the triers of fact, the membership at large of the Senate, are unable to assess the credibility of witnesses. There may, indeed, be cases in which it is essential to observe witnesses directly, and there may be, perhaps, cases in which review of even a videotape is not an adequate substitute for direct observation. While it is not my purpose in these remarks to review in any detail the evidence upon which the Senate convicted Judge Claiborne, I would like to offer several comments about the importance of evaluating the credibility of witnesses in this proceeding.

The point has been urged that the question whether Judge Claiborne wrote to his tax preparer, Joseph Wright, on April 11, 1980, to inform Mr. Wright of his full income from legal fees for 1979 presents an issue of credibility which cannot be determined from the printed record of sworn testimony. The difficulty with this contention is that it assumes that Judge Claiborne had a complete, or at least a compelling, defense if the letter had actually been written.

Of course, if the letter was written after the date it bears, then Judge Claiborne's tax violations would pale beside potential charges of perjury and the fabrication of evidence. It seemed to me, therefore, that we should begin by assuming that the letter had been written. We could equally assume that, for one reason or another, Mr. Wright had not seen the letter. Ellen Arthur, Judge Claiborne's newly discovered witness, stated in her affidavit that, 2 or 3 days after the judge's secretary had delivered an envelope to Mr. Wright's office, Mrs. Wright had stated that the letter could not be found or had been misplaced.

The assumption that the letter was written on April 11, 1980, does not elevate Judge Claiborne to high ground. Rather, the letter confirms an image of Judge Claiborne produced by other evidence. The judge was a person who had a very good sense of his financial situation. He prepared slips to memorialize his legal fee income and he recorded the information from these slips in a financial diary. On or about March 1, 1980, without consulting his detailed records, Judge Claiborne wrote to his accountant that his legal fee income for 1979 amounted to about $46,000. He was off by about $5,000, but he was in the right neighborhood.

Then, if we continue to assume that he wrote the April 11, 1980, letter on the date it bears, Judge Claiborne made a precise calculation of his legal fee income for 1979 on that day. He performed this calculation by totaling, on April 11, 14 separate items of legal fee income, and writing by hand a letter to his accountant which stated the result of this calculation. Judge Claiborne asked the Senate to believe that 19 days later he simply placed this careful calculation out of mind when he spoke to his accountant about the preparation of his 1979 tax return.

Then, 34 days later, when Judge Claiborne filed his judicial financial disclosure report, he again did not use the figure for legal fee income which he had only recently calculated. The disclosure report diminishes the relevance of another credibility issue;

namely, whether Judge Claiborne had signed his 1979 return in blank or whether he signed the return in Mr. Wright's office after the return had been prepared. The disclosure report confirms, no matter who is to be believed about the signing of the tax return, that Judge Claiborne knowingly intended to disclose to the Government, both on his disclosure form and on his subsequent tax return, only part of his legal fee income for 1979. These objective circumstances are sufficient to support the conviction on the first article without resolving the credibility of testimony about ancillary matters.

Then, with respect to the second article, it should be recalled that the case presented by the House consisted primarily of documents, including Judge Claiborne's tax return for 1980, and the testimony of an expert. A letter to Judge Claiborne dated April 6, 1981, from his tax preparer for 1980, Jerry Watson, establishes that Judge Claiborne knew that his tax preparer was planning to report a capital loss on the law practice which the judge had abandoned several years earlier. The patently fictitious capital gains transaction on the previously abandoned law practice, which was used to eliminate $88,000 in ordinary income from legal fees, was sufficient to establish a willful failure to report income for 1980.

The demeanor of witnesses may be important in other impeachments, but in this impeachment the critical facts were fairly established based on solely the written record. Furthermore, as Members were aware, videotapes of the committee's hearings were available to any Member who wished to supplement his or her reading of the transcript of the committee's proceedings.

THE SENATE'S OBLIGATION TO "TRY" IMPEACHMENTS

The Constitution provides that the Senate shall have the power to "try" impeachments. If the word "try" imported into the Constitution the exact specifications of a judicial trial, then the Senate might have little latitude to define its rules of proceedings. However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trial. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." The Federalist No. 65, at 428 (B. Wright ed. 1961). Justice Story expressed the similar opinion that "it is obvious that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments." J. Story, Commentaries on the Constitution, § 765, at 532 (3d ed. 1858).

Instead, the requirement that conviction on impeachment be by "trial," I believe, was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426 (A. Hamilton). The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted).

In my opinion, the Senate performed its judicial task with complete impartiality. There were many outside of the Senate who thought that this impeachment should have taken the Senate only several hours to resolve after the House exhibited its articles in early August. The Senate determined, instead, that Judge Claiborne should have available to him the subpena power of the Senate to bring here witnesses who could testify to the tax transactions in 1979 and 1980. These witnesses were examined and cross-examined by counsel and also questioned by members of the committee over 7 days of hearings. The full Senate received briefs from the parties and then heard closing arguments from the managers, from Judge Claiborne's counsel, and from Judge Claiborne. The Senate deferred its decision whether to hear witnesses in open Senate until it heard and considered these arguments. Senators then deliberated with great care prior to voting. In every sense the Members of the Senate fulfilled their special impeachment oath to "do impartial justice according to the Constitution and laws."

I would like to conclude with a brief note of appreciation. Each member of the Impeachment Trial Committee—the vice chairman, Mr. Sarbanes and Mr. Hatch, Mr. Warner, Mr. Rudman, Mr. Pressler, Mr. McConnell Mr. Heflin, Mr. DeConcini, Mr. Pryor, Mr. Gore, and Mr. Bingaman—approached the task of the committee with a great sense of purpose and seriousness. The membership of the committee agreed to, and then adhered to, a requirement that a quorum, a majority of the 12-person committee, be present at all times. The committee was presented with important questions about the proper scope of the impeachment proceedings before it, and our ability to resolve those questions, wisely I hope, depended on the intelligence and effort which each Member contributed to our deliberations.

There being no objection, the excerpt was ordered to be printed in the Record, as follows:

[New York University Law Review]

THE HISTORICAL AND CONSTITUTIONAL BASES FOR THE SENATE'S POWER TO USE MASTERS OR COMMITTEES TO RECEIVE EVIDENCE IN IMPEACHMENT TRIALS

(Napoleon B. Williams, Jr.)

[Excerpt]

THE COMMITTEE PRACTICE OF THE HOUSE OF LORDS

Although the House of Lords turned less frequently to the use of committees in impeachment proceedings than did the Commons they were at times employed for a variety of purposes. Like the Commons, the Lords occasionally used committees at the pretrial stage of proceedings to search the precedents and to set the proper procedure.[65] More significantly—and despite Professor Berger's assertion to the contrary—even the Lords' power to hear evidence at impeachment trials was at times delegated to a committee,[66] and precedent for this practice was accessible to the American framers.

Jefferson, for example, turned to Selden for "common rules" [67] on examination of witnesses during impeachment trials and concluded that "the practice is to swear the witnesses in open House, and then examine them there; or a committee may be named who shall *examine them in committee,* either on interrogatories agreed on in the House or such as the committee in their discretion shall demand." [68]

Though Vice President Jefferson's statement postdates the Constitutional Convention, the source on which he relies was cited authoritatively in the colonies as early as 1768.[69] This suggests that the framers were aware of the English practice of using committees in impeachment trials. But more convincing historical evidence is available. Neither Jefferson nor the other Founding Fathers had to rely solely on Selden's version of English trial practice. The *State Trials*, with which the framers were also familiar,[70] reveals a number of English impeachment trials in which the House of Lords used committees to hear evidence.

In 1620, for example, the House of Commons impeached the Lord Chancellor of England, Francis Bacon, specifying in 28 articles its charges of corruption.[71] The Lords then "proceeded to the Examination of the Complaints, and took divers Examinations of Witnesses in the house, and appointed a select Committee of themselves, to take Examination of Witnesses to the Briberies and Corruptions on the Lord Chancellor; which being ended and collected, were ordered to be transcribed with the proofs . . .[72]"

Although Bacon's subsequent confession[73] obviated the need for the Lords to use the committee's evidence, the implication is clear: the Lords felt confident of its power to use transcribed testimony in lieu of examining witnesses before the full House.

In a connected case, the House of Commons impeached the Bishop of Llandaff, Dr. Field.[74] The Lords initally appointed a committee to take evidence on his impeachment and then heard the report of a committeeman, the Earl of Huntingdon.[75] From this report, "a collection was made thereof, which . . . [was] delivered by his lordship into court," [76] *i.e.*, the House of Lords sitting as a high court of impeachment. After this collection was read, the Lords debated the evidence [77] and sent the following declaration to the Commons:

"Whereas the house of commons informed this house of a great misdemeanor committed by Dr. Field . . . and hath also sent since to demand judgment in that cause; the Lords having full examination thereof upon oath, do not find it proved in the same manner as, is seems, they [the Commons] were informed by examinations taken in their house.[78]"

In disputing the Commons's conclusions on the basis of committee testimony alone, the Lords indicated its intention to place committee transcripts on an equal footing with personal examination of witnesses before the bar of the House.

The impeachment of the Lord Treasurer Middlesex [79] in 1624 provided yet another opportunity for the use of committees to take evidence in impeachment trials. Like Sir Francis Bacon, the Lord Treasurer was a man of eminence and prestige. So prominent, in fact, was Lord Middlesex that King James I personally appealed to the Lords on his behalf,[80] urging them to be on guard lest one "man's particular ends bring forth a precedent, that may be prejudical to you all and your heirs after you." [81] Despite the prominence of the respondent and the political significance of the trial, the Lords chose to try the impeachment without having the full House hear testimony, instead relying on depositions taken before sundry committees.[82]

Delegation of authority to a committee in a trial of such importance manifests the ease with which the Lords moved from full house to committees during impeachment proceedings, at least up to the point of final judgment. During the proceedings against Lord Middlesex, for example, a report read before the House of Lords stated that speeches before the examining committee had questioned the honor of the Lord Treasurer, and that he "desired Examinations might be taken, upon oath, for the clearing thereof."[83]

The natural response of the Lords was to appoint a "sub-committee . . . constituted to take such Examinations."[84] This committee reported back, and, after some debate, the Lords agreed that yet another committee "should be appointed to draw up the heads of a charge against the Lord Treasurer, out of a brief of the last report, and examinations taken by the former committee."[85] Thus, before the House of Commons had even formulated their own charges, the House of Lords had used three separate committees to investigate and act upon the matter of the Lord Treasurer's honor.

Indeed, the House of Commons subsequently did take cognizance of this matter, deciding at that point to impeach.[86] It asked the Lords for a conference at which the charges in the complaint against the Lord Treasurer were enumerated.[87] The Lords then established a fourth committee, and several days later "the archbishop of Canterbury reported to the house [of Lords], That the Committee appointed to examine into the Complaint against the Lord Treasurer, had met, and examined divers witnesses . . . and had made a collection of Part of said Charge." [88] This collection was disclosed to the Lord Treasurer, who was then asked to present a list of his witnesses.[89] Although there is no direct reference to the forum in which the defense witnesses testified, they too must have been examined in committee,[90] since their testimony was read by the clerk during the trial.[91]

This review of English precedents shows beyond doubt that the House of Lords used committees to hear evidence during impeachment trials in the early 17th century.[92] It is difficult to determine definitively whether this practice continued, as no direct reference to the use of committees during later impeachment trials has been discovered. It is clear, however, that, unlike other practices which were outlawed by affirmative action of the House of Lords, the use of committees to take evidence and examine witnesses has never been banned or disavowed as precedent—as were other impeachment procedures considered to have been wrongly invoked.[93]

Having established the outlines of the English practice with which the framers of the American Constitution were able to become familiar, the extent to which the framers intended to authorize parallel procedures by their use of the term "impeachment" in article I, section 3 of the Constitution must now be determined.

FOOTNOTES

[65] *E.g.*, 4 HATSELL, *supra* note 29, at 174, 185, 210.

[66] *See* text accompanying notes 71-92 *infra*. Professor Berger states that his search of English impeachment proceedings failed to reveal any reference to the Lords' use of committees to hear evidence, BERGER, *supra* note 13, at 171. This may perhaps be explained by his heavy reliance on Hatsell, who overlooked such precedents. Hatsell's shortcomings were known to Vice President Jefferson, who noted that Hatsell "only treated some general heads," making it necessary "to recur to other authorities in support of a number of common rules of practice to which his plan did not descend." Jefferson, *supra* note 29, at 432.

[67] The phrase is from the preface to his *Manual of Parliamentary Practice*. Jefferson, *supra* note 29, at 432.

[68] *Id.* at 521 (emphasis added).

[69] BERGER, *supra* note 13, at 87 n.160; *see* text accompanying notes 27-30 *supra*.

[70] Berger, *supra* note 13, at 122; *see* text accompanying note 26 *supra*.

[71] 2 State Trials, *supra* note 30, at 1087-88.

[72] *Id*, at 1101.

[73] *Id.* at 1105-11.

[74] *Id.* at 1097.

[75] *Id.* at 1116.

[76] *Id.*

[77] *Id.* 1116-18.

[78] *Id.* at 1118.

[79] *Id.* at 1183.

[80] *Id.* at 1218-19. King James I did not specifically defend the Lord Treasurer but rather pleaded that the lords take special care to search out and establish the facts, reminding them that "all Treasurers, if they do good service to their masters, must be generally hated." *Id.* at 1219.

[81] *Id.* at 1219.

[82] Immediately upon receiving the compliant of the House of Commons, the lords took into their consideration how to proceed in the business, and then referred the Examination thereon to the subcommittee on Munitions . . . [and decided that] their lordships may divide themselves into several committees, if they please, for expediting this business; and may send for any witnesses to be sworn here in court, that may conduce to the Examination thereof. *Id.* at 1197.

[83] *Id.* at 1183.

[84] *Id.*

[85] *Id.* at 1189.

[86] *Id.* at 1190.

[87] *Id.* at 1189.

[88] *Id.* at 1197.

[89] *Id.* at 1199.

[90] The report states that the witnesses were to be "examined as the house shall think fit." *Id.* at 1200.

[91] *Id.* at 1228.

[92] The practice of using committees to hear evidence is also demonstrated by practices in several trials which, although analogous to impeachment trials, are not denominated as such in the State Trials. For example, in proceedings against Lord Kimbolton and five members of the House of Commons in 1641, 4 State Trials supra note 30, at 83, the King's Attorney requested that "a Select Committee of Lords . . . be appointed to take the examination of such Witnesses . . . as formerly hath been done in cases of like nature, according to the justice of this house." Id. at 85. The committee was never formed because the case did not reach trial on the merits. The Lords refused to hear the case since, by circumventing and intimidating the House of Commons, the King's manner of proceeding had breached the privileges of the Commons. Id. at 104-10.

The Lords routinely delegated the evidence-hearing functions, not only to committees of their own members but also to tribunals outside of Parliament. In the 1624 trial of Samuel Harsnett for extortion, for example, the Lords heard the complaint of the Commons and the answer of the accused and then entered an order that "in respect to the shortness of time and the multiplicity of business, now depending to be determined, the complaint of the Commons, against the bishop of Norwich, shall be referred to the High Commission, to be examined by them; and they to make report thereof to the house, and then the house will judge of it." 2 id. at 1258. In thus employing the High Commission, an ecclesiastical body created by the English monarchs to perform judicial and nonjudicial functions beyond the competence of ordinary ecclesiastical courts, 1 Holdsworth, supra note 32, at 605–11, the Lords delegated important functions to a forum external to Parliament.

On the same day, the Bishop of Norwich brought a complaint against his accuser before the House of Lords. The complaint, "with the witnesses the bishop produced to prove it, was referred to the examination of the archbishop of Canterbury, who was to make report thereof to the house for their judgment of the matter." 2 State Trials, supra at 1258. The Archbishop of Canterbury, a lord spiritual, may have assumed the function of a master, an advisory or a trier. Unfortunately, no further mention of the proceedings has been discovered so it is impossible to determine exactly what role he played.

[93] An example of a restriction limiting the use of a procedure to the specific trial for which it was adopted occurred in the Lord Middlesex impeachment proceedings. The House of Lords gave the Lord Treasurer permission to answer the Commons's complaint directly in Commons, but ordered "[t]hat no lord of that house shall hereafter without license, answer any complaint in the house of commons." 2 State Trials, supra note 30, at 1185. Had the Lords believed that examination of witnesses in committee was an equally anomalous impeachment trial procedure, it could easily have provided that no precedent would be established by the use of a committee in any particular trial.

STATEMENT OF SENATOR DALE BUMPERS

Mr. BUMPERS. Mr. President, on October 10, 1986, the Senate completed the impeachment trial of Harry E. Claiborne, U.S. district judge for the district of Nevada, finding the judge guilty under three of the four Articles of Impeachment presented by the House of Representatives.

I voted guilty on all four Articles, and I take this opportunity to set forth my reasoning and some comments concerning the trial.

Article II, Section 4 of the U.S. Constitution provides that "all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Article I provides that the House of Representatives shall have the sole power of impeachment and that the Senate shall have the sole power to try all impeachments.

On August 10, 1984, in the U.S. District Court for the District of Nevada, Judge Harry E. Claiborne, while serving as a judge of the U.S. District Court for the District of Nevada, was found guilty by a 12-person jury of making and subscribing a false and fraudulent income tax return for the calendar years 1979 and 1980, and in violation of section 7206(1) of title 26, United States Code. A judgment of conviction was entered against Judge Claiborne for each violation of section 7206(1), and a sentence of 2 years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5,000 for each violation. The U.S. Court of Appeals for the Ninth Circuit affirmed the conviction, and the U.S. Supreme Court denied defendant's petition for a writ of certiorari. Judge Claiborne began serving his sentence last May at the Federal prison at Maxwell Air Force Base in Alabama. He refused to resign from office and continued to draw his $78,700 judge's annual salary up until his removal from office by the Senate.

The House of Representatives has adopted four Articles of Impeachment against Judge Claiborne for misbehavior and for his crimes and misdemeanors while in office. Those articles, exhibited in House Resolution 461, were passed unanimously by the House on July 22, 1986. The Senate sat as a Court of Impeachment on October 7 through 9, 1986, to determine whether Judge Claiborne was guilty or not guilty or each of the charges stated in the Articles of Impeachment.

First, I think it important to note that impeachment trials in the Senate are sui generis. The Senate, while sitting as a Court of Impeachment, is not bound by the rules of evidence or any other rules of procedure followed in Federal courts. The Senate has adopted its own rules of practice and procedure to be followed in impeachment trials. Under rule XI of those rules, the Senate may choose to appoint a committee of Senators to receive evidence and take testimony during the Senate's consideration of the Articles of Impeachment. Pursuant to this rule, a 12-member, bipartisan committee was appointed by the presiding officer.

That committee, chaired by the distinguished Senior Senator from Maryland, Senator Mathias, received evidence and took testimony from several witnesses during 7 days of meetings. The committee provided a full record of these proceedings to the Senate. After studying this evidentiary record and listening carefully to the comments of my colleagues who served on the committee as well as the argument by the distinguished managers on the part of the House and by both the respondent and his counsel, I determined that Judge Claiborne should be found guilty under each Article of Impeachment.

Articles I and II charge Judge Claiborne with willfully and knowingly filing false income tax returns for the years 1979 and 1980. Under 28 U.S.C. section 2706(1), any person who willfully makes and subscribes any tax return, under penalties of perjury, which he does not believe to be true and correct as to every material matter is guilty of a felony offense. In *United States* v. *Pomponio,* 429 U.S. 10 (1976), the Supreme Court held that willfulness as used in section 2706(1) simply means a "voluntary, intentional violation of a known legal duty." The Court has held that the taxpayer's intent can be inferred from a variety of factors, including evidence of surreptitious cash transactions, inadequate recordkeeping, withholding of material information from the taxpayer's bookkeepers by providing only summary sheets of records in question, and the substantial understatement of taxable income for the years in question. *United States* v. *Hughes,* 766 F. 2d 875, 877–878 (5th Cir. 1985).

I note that the respondent was tried twice on the charge of income tax evasion. In his first trial, he was charged with acceptance of certain bribes in addition to the income tax charges, and the jury was unable to reach a verdict. Upon retrial, the Government elected to drop the charges pertaining to bribery and pursue only the income tax charges.

The evidence presented at Judge Claiborne's second trial, as well as evidence reported by the Senate Impeachment Trial Committee, overwhelmingly supports the finding of willfulness.

Judge Claiborne admits that he kept faulty records and provided his accountants with summary sheets and that he cashed very large checks at local casinos, a change from his previous practice of depositing such checks in banks. He underreported his income for the years in question by over $100,000. In his own words, the tax return, at least for the year 1980, was "abominable." Filing a false return is a felony offense, and thus an impeachable offense. Therefore, I voted "guilty" on both Article I and II, which essentially restate the underlying facts which were the basis of his conviction on two counts of violation of Sec. 2706(1).

Article IV charges that Judge Claiborne, by willfully and knowingly filing false income tax returns and having been convicted of the same while serving as a judge of the U.S. District Court for the District of Nevada, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary. Judge Claiborne has undoubtedly brought disrepute on the Federal courts by refusing to resign his post following his conviction and by continuing to draw his salary while serving his prison term. Public confidence in the Federal judiciary is essential to both the administration of justice and to the preservation of our freedoms which are, in the last analysis, protected by the courts under Article IV of our Constitution. Therefore, I also voted "guilty" on this Article.

I would note that Judge Claiborne was convicted under each of Articles I, II and IV by an overwhelming majority of Senators.

Article III, the only Article under which Judge Claiborne was not convicted by a two-thirds vote in the Senate, presented the Senate with a peculiar question on precedent for future Senate impeachment trials. I write separately to emphasize my views of both the meaning and the limits of the Senate's decisions with respect to the third Article. Article III asserts that Judge Claiborne should be impeached by the Senate because he has been convicted in the district court of filing a false income tax return.

Some Senators obviously believed that had the Senate voted to convict Judge Claiborne under this Article, this could possibly have established an unwanted and unwarranted precedent for future impeachment proceedings. They believed that adopting the standard set forth in Article III would suggest that a conviction by the judicial branch should establish incontrovertible grounds for impeachment in the legislative branch, and that such a standard would overlook the constitutional standard for impeachment established in Articles I and II of the Constitution, which states that the Senate shall have the sole power to try all impeachments.

Conversely, a jury's acquittal of a criminal charge is by no means preclusive of any finding of guilt by the Senate in the event of a subsequent impeachment by the House. The Senate could take judicial notice that an investigation is currently pending in the Court of Appeals for the 11th Circuit against a district judge on conduct for which that judge was tried and acquitted by a jury, but which may cause the House to bring impeachment proceedings against that judge.

The Senate's decisive vote against the respondent's motion to establish guilt beyond a reasonable doubt as the Senate's standard of proof in trying impeachments indicates the desire of this body to retain the independent nature of the impeachment process. While this clearly is an essential component of due process in the criminal justice system, it has no place in the constitutionally distinct process of impeachment.

The vote on this Article was a difficult one for me, but I voted to find Judge Claiborne guilty under Article III as well because I believe that there was a sufficient amount, indeed, an overwhelming amount, of evidence to support his conviction under this Article. However, I was troubled by allegations of new evidence presented to the Senate Impeachment Trial Committee, as well as by the opinions of the three circuit judges who dissented from the order denying Judge Claiborne's petition or rehearing en banc.

Those judges referred to exculpatory evidence which was allegedly withheld from the defense in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and statements by prosecution witnesses requested under the Jencks Act. That evidence pointed to allegedly improper activity on the part of FBI agents assigned to the agency's Strike Force on Organized Crime and other Federal agents operating in Las Vegas.

The judge's allegations of official misconduct are deeply troubling, but they do not undercut the overwhelming evidence of the respondent's guilt. Therefore, I will support the resolution to be offered by Senator Pryor which will call for a full investigation of strike-force type acivities carried out by Federal law enforcement and intelligence agencies. These Government agencies are, of course, not above the law, and if their activities unfairly deprive citizens, whether they be Federal officers or not, of their constitutional rights, then those activities should be eradicated.

STATEMENT OF SENATOR J. JAMES EXON

Mr. EXON. Mr. President, it is a sad day when the Senate is compelled to remove an individual from office. Harry E. Claiborne is only the fifth individual in our Nation's history to be removed from office by the congressional power of impeachment.

Our Founding Fathers designed a Federal Government which stands on the foundation of checks and balances between the three equal branches of Government. Under our Constitution, judges "hold their offices for good behaviour." Life appoinments for Federal judges insulate the judicial branch from shifting political winds and allow the judicial branch to operate with independence. Therefore, it should be difficult to remove a Federal judge from office.

The House of Representatives has the power to impeach a Federal officer and the Senate has the "sole power to try all impeachments." In convicting Judge Harry E. Claiborne of three articles of impeachment the Senate rose to one of its most solemn constitutional tasks.

THE COMMITTEE OF TWELVE

For the first time in the Nation's history, the Senate employed a committee of 12 Senators to receive and digest evidence relating to the Articles of Impeachment. The committee is to be commended for its efforts and its diligence. Although the committee did not make a recommendation to the full Senate, or prejudge evidence, their work made the Senate's task manageable.

The usefulness of such a committee in future impeachment trials will depend on the nature and facts of individual cases. In the case of Harry E. Claiborne, the case was comparably simple and the objective facts not in serious dispute. I voted to hear additional witnesses because I felt that there would have been some personal testimony before the full Senate which would have been helpful in the Senate's deliberations. However, just as a judge determines the scope of evidence in a trial, the Senate, as a body, determined that the evidence before the Court of Impeachment was sufficient to reach a judgment on the articles of impeachment.

However, I urge the Senate to further investigate the actions of the executive branch and the events which led to the indictment of Harry E. Claiborne. If the defendant's assertions regarding an executive branch "vendetta" are true, the Senate should review law enforcement practices and the status of the relationship between the executive and judicial branches of our Federal Government. The existence of a "vendetta" does not alter the issue of whether Harry E. Claiborne violated section 7206(1) of title 26 of the United States Code. The evasion of income tax liability is in and of itself an act of misbehavior and a high crime and misdemeanor sufficient to impeach any Federal judge.

THE ARTICLES OF IMPEACHMENT

The four Articles of Impeachment centered around Harry E. Claiborne's tax returns for 1979 and 1980. The first article alleged that Harry E. Claiborne willfully and knowingly made and subscribed a U.S. individual income tax return for calendar year 1979 which failed to report substantial income. The second article alleged that Harry E. Claiborne willfully and knowingly made and subscribed a U.S. individual income tax return for calendar year 1980 which failed to report substantial income. The third article alleged that Harry E. Claiborne was found guilty of two violations of making and subscribing a false income tax return for the calendar years 1979 and 1980 and was, therefore, guilty of misbehavior and of high crimes in office. The final article alleged that by violating income tax laws, Harry E. Claiborne betrayed the trust of the American people; reduced confidence in the judiciary; brought disrepute on the Federal courts and the administration of justice by the courts, and as such was and is guilty of misbehavior and misdemeanors.

ARTICLE I

The objective facts before the Senate indicated that Judge Claiborne received $41,072.93 in ordinary income from the practice of law prior to becoming a Federal district judge. The money was paid in 14 separate checks. Harry E. Claiborne reported only $22,332.87 of this income on his 1979 tax return. In March of 1980, Harry E. Claiborne prepared a memorandum too for the purpose of applying for a loan. In March 1980, Harry E. Claiborne estimated his fee income to be approximately $46,000. In June 1980, Harry E. Claiborne prepared a worksheet for his accountant which set forth his earnings from "private law practice before judgeship." That worksheet which formed the basis of Harry E. Claiborne's 1979 tax return listed his earnings as $22,332.87.

The March memorandum clearly indicates, as the House of Representatives alleges, that Harry E. Claiborne knew his actual fee income when it served his interests. It is unfathomable that an individual could "forget" nearly $20,000 of income in such a short period of time. It is also significant Harry E. Claiborne suddenly changed his routine procedure of depositing each fee check into his bank account. Harry E. Claiborne knew that his accountant prepared his income tax from the bank deposit records.

The defense suggests that the defendant delivered a letter to his accountant which correctly stated his fee income. This assertion is questionable. Whether the April 11 letter was delivered or authentic would not alter my opinion, as to the willfulness of Harry E. Claiborne's understatement of earnings on his 1979 tax return. Furthermore, there is no evidence that Harry E. Claiborne attempted to correct his 1979 tax return prior to his criminal indictment.

There is sufficient evidence to infer that Harry E. Claiborne willfully and knowingly failed to report substantial income on his 1979 tax return.

ARTICLE II

In 1980, Harry E. Claiborne received four checks totaling $87,912 and sold his home for $725,000 incurring a $214,812 taxable gain. On April 13, 1981, Harry E. Claiborne filed with the Internal Revenue Service form 4868 an application for an automatic extension of time to file a U.S. individual income tax return. In that application, Harry E. Claiborne estimated his total tax liability to be $42,847.96

Harry Claiborne retained Jerry Watson of "Creative Tax Planning" to prepare his 1980 tax return. After several discussions, Mr. Watson produced a tax return which resulted in a July tax refund of $44,256.

Harry E. Claiborne working with his "creative tax planner" reduced his tax liability from $97,864 to $1,103. Harry E. Claiborne is a well educated individual who has handled tax matters as a private attorney. The explanations of the defense that Harry E. Claiborne relied in good faith on his tax preparer defy belief. Given the background of Harry E. Claiborne and his tax preparer, Jerry Watson, combined with the tremendous discrepancy between the April tax estimate and July refund check, there can be no case of "good faith" reliance by Harry Claiborne on Watson's advice.

The facts clearly leads the to the conclusion that Harry E. Claiborne willfully and knowingly understated his income on his 1980 income tax returns.

ARTICLE III

The third article of impeachment alleged that Harry E. Claiborne was and is guilty of misbehavior and high crimes in office due to the fact that he was convicted of two felonies.

The decisions of the judicial branch do not and should not compel a decision of the U.S. Senate sitting as a Court of Impeachment. However, the U.S. Senate cannot ignore the criminal conviction of a sitting U.S. judge.

At the very least the conviction of Harry E. Claiborne must be considered as evidence of misbehavior and high crimes in office. Mr. Claiborne did not assert that he did not receive a fair trial. In this case, the evidence is conclusive. Because the conviction was valid and the underlying offenses are the type which merited removal from office, I voted guilty on article III.

ARTICLE IV

The final article of impeachment alleged that Harry Claiborne "betrayed the trust of the people of the United States and reduced the confidence in the integrity and impartiality of the judiciary." The facts which compelled a vote of guilty on the first three articles also compelled a similar vote on the fourth and final article. The specter of a convicted felon maintaining the title and honor associated with being a Federal judge, brings disrepute to the Federal judiciary. The Constitution gives the Congress only one method, impeachment, to remove such an individual from the bench.

CONCLUSION

After a careful examination of the evidence, an evaluation of the personal appeal of Harry E. Claiborne before the U.S. Senate, the deliberations and careful reflection, I came to the inescapable conclusion that Harry E. Claiborne committed impeachable offenses and should be removed from office on all four articles of impeachment. This first impeachment trial in over 50 years serves as a disturbing reminder to the U.S. Senate that it has an awesome responsibility in confirming Federal judges to lifetime appointments.

[Congressional Record—October 16, 1986—S 16821]

STATEMENT OF SENATOR DANIEL J. EVANS

Mr. EVANS. Mr. President, when the Senate tries an impeachment case, we take upon our shoulders the most weighty of the responsibilities U.S. Senators are obliged to bear. In the recent Claiborne trial, we were asked to cast our votes to acquit or convict a man whom the House of Representatives had voted unanimously to impeach. I trust that these votes were not easy for any Member.

No person delights in passing judgment on another. Even with appropriate standards of review, the task is difficult. That is why citizens sitting as jurors in criminal trials are given elaborate instructions and clear guidance. Senators sitting as jurors in an impeachment trial have little guidance. But what guidance we are given should be followed.

In a matter of this gravity it is wholly right and proper that we avail ourselves of all resources which might assist us in reasoned deliberations. Yet, in this case we chose to make do with incomplete information and a nonstandard of review. Although all 100 of us sat in judgment, only a chosen few heard testimony or examined witnesses.

A cardinal precept of the criminal law is that a conviction is proper only when judgment is rendered by a jury which has had full and complete exposure to the presentations of the prosecution and defense. An incomplete record is flatly insufficient as a basis for a final decision. But we voted not to have the full Senate hear witnesses or have an opportunity to question the accused.

Moreover, I believe that once the case has been presented to us, we should apply a consistent standard of review. While it is of course proper for the Senate to decide for itself what the standard is, once determined it should be applied by all. But we voted to deny to ourselves the benefit of an explicit standard of review.

Under the Constitution, "the Senate shall have the sole power to try all impeachments." What is left unanswered is whether judgment in cases of impeachment can be rendered without the Senate actually having had a chance to take sufficient time to hear testimony, evaluate the credibility of witnesses, and assess the full range of evidence. If the Founding Fathers had foreseen that election year haste was a potential impediment to careful consideration in the Senate it is likely they would have handed down to us more detailed instructions.

In prior impeachment cases, the full Senate had an opportunity to receive all the evidence directly. No committee was appointed to serve as a buffer between the accused and those responsible for making the final judgment. This case was also unprecedented in another respect. While more judges have been tried than any other class of civil officer, this case apparently was the first one in which the accused had already been convicted in a court of law. Neither the Constitution nor previous cases shed much light on the path which is to be followed under such circumstances.

It is generally acknowleged that the Framers of our Constitution borrowed heavily from the British when drafting the impeachment provisions. Yet, while a Senate impeachment trial is procedurally analogous to a trial before the House of Lords, the object of the proceedings is decidedly different. English impeachments contemplate imposition of criminal penalties upon conviction. In the case of Archbishop Laud, the lords went so far as to impose the death penalty.

Under our Constitution the penalty for conviction is limited to removal from office. Subsequent civil or criminal actions are not precluded, nor are they required. Once convicted, a civil officer must be removed from office because neither immunity from prosecution nor Presidential pardon are available to those whom the Senate has voted to convict.

Our vote was the final word on Judge Claiborne's career. We were the trial court and the appellate court at the same time. It was thus incumbent upon us to take the utmost care to ensure that our proceedings were proper. I believe we lost sight of the fact that the procedures of justice are often more important than the substance of the laws in creating the perception of fairness.

That brings us to a discussion of the actual charges. We considered four articles of impeachment. It was our obligation to decide whether any of those articles warranted conviction.

But what constitutes an impeachable offense? Article 2, section 4 of the Constitution states that civil officers "shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." In this case, neither of the specifically enumerated crimes—treason and bribery—were alleged. We were limited then to considering whether the misconduct of Judge Claiborne was sufficiently egregious that it falls within the ambit of the general term.

Constitutional scholars generally agree that only a limited group of offenses qualify as "high crimes and misdemeanors." Evidence suggests that the Framers intended that the English "great offenses" define the range of misconduct contemplated by our Constitution. At common law in England, misapplication of funds, abuse of official power, neglect of duty, encroachment on or contempt of legislative prerogatives, and corruption were impeachable offenses. Whether the list is exclusive is open to question.

During the impeachment trial of President Andrew Johnson, House manager John Bingham suggested that it may be inappropriate to take an overly narrow view of what constitutes impermissible behavior.

> An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.

Clearly, our object here should have been to ensure that we took a balanced and fair approach to evaluating the acts for which Judge Claiborne was impeached. In making that evaluation, it was important to keep in mind that the stakes were higher than removal of a judge from office. The real issue was whether we would do more harm to the cause of justice by acting in undo haste than we might contribute to the cause of justice by removing a convicted felon from the Federal bench.

Under Article III, section 1, judges "shall hold their offices during good behavior." Thus, it may have been appropriate to hold Judge Claiborne to a higher standard than that which might apply to civil officers generally. The judiciary play a critical role in our system of government and nothing would be more destructive than to permit the taint of official indifference to law to permeate the judicial system. It is equally true that we should not have allowed the Senate proceedings to adhere to any but the highest standards.

One critical question was whether the mere fact of conviction so besmirches the judicial facade that a thorough independent investigation was unnecessary. If so, what was the real point of these proceedings? I felt that we were bound to do more than simply ratify a decision already made.

Lawrence Tribe, an eminent constitutional scholar, has stated that "a showing of criminality is neither necessary nor sufficient for the specification of an impeachable offense." Certainly, violation of a speed limit would be insufficient by itself to warrant an impeachment. At the same time, a willing violation of the code of judicial conduct may be. In every instance, it is up to the Senate to evaluate all of the circumstances surrounding the conduct at issue. Only then can we truly say that we have discharged our responsibilities in full accord with the oath we have taken.

It may be that a full examination of the facts of this case would have lead me to a clear conclusion that Judge Claiborne acted with criminal intent and that conviction was justified. But, it may also be true that such an examination would have raised sufficient doubts in the minds of at least 34 Senators that we would have voted to acquit. The trial of an impeachment is no place for shortcuts or haste. Justice may be elusive, but that is no excuse for a half-hearted try to find it.

STATEMENT OF SENATOR CARL LEVIN

Mr. **Levin**. Mr. President, there is a legal maxim which holds that "hard cases make bad law." But I fear that the Senate's recently concluded impeachment proceedings in the case of Judge Claiborne provided us with a new piece of folk wisdom: "easy cases can make bad law too."

On its face, this appeared to be a relatively simple matter. The respondent, Judge Harry Claiborne, had been found guilty by a jury of his peers, his case had been appealed and those appeals had been denied. And while he still has additional motions pending—and may have them pending for years—they do not focus as much on the facts which contributed to the verdict of guilt as on the processes used to assemble those facts.

Given all that, there was, I fear, a natural tendency for members of the public and perhaps even some Members of the House and Senate, to believe that Mr. Claiborne did not deserve very much of our time or attention. In fact, in discussing the scheduling of the impeachment proceedings in the Senate, the operating assumption was always that it ought not take more than 2 days. The theory seems to have been that we should act quickly. But the Constitution requires that we act in other ways.

THE CONCEPT OF A TRIAL

I believe our constitutional role requires us to take adequate time—in any case brought before us—to reach a judgment ourselves; to determine as individuals and as a body whether or not the respondent is guilty of high crimes and misdemeanors so as to require removal from office.

The Constitution is clear: "the Senate shall have the sole power to *try* all impeachments," Article I, section 3; it also provides that "the *trial* of all crimes except impeachment shall be by jury," Article II, section 2. (Emphasis added.)

It seems clear from those constitutional requirements that in an impeachment, the Senate is required to act as a fact finder—for fact finding is the heart of trying any case. The respondent in this case made that point repeatedly. In briefs which are part of the record, the Senate is characterized again and again as "a finder of the facts." The House, in its briefs, never challenged that characterization. Indeed, the House seemed to accept it when they argued that the record before the Senate contained enough information to allow us to make a judgment on the facts—and those facts, they believed, required us to find that Harry Claiborne "willfully and knowingly" filed tax returns which he "did not believe to be true and correct."

So the Constitution gives the Senate the "sole power" to try impeachments, and it seems clear to all that the Senate's constitutional mandate is to independently evaluate both the disputed and the undisputed facts involved in any case brought before us.

THE ROLE OF WITNESSES BEFORE THE SENATE AS RELATED TO ARTICLES I AND II

When facts are in dispute—as they were in article I and II of the impeachment resolution as brought to us by the House—a finder of fact can reach a resolution of that dispute only if he or she is able to evaluate the credibility of key witnesses.

For 500 years, the law has recognized that the way in which a witness offers testimony—the nonverbal cues or demeanor of the witness—is an important element is evaluating credibility. That is why Wigmore, in his classic text on evidence, pointed out that the demeanor of a witness is "always assumed to be in evidence."

I believe this point is so well established that extended comment about its centrality to legal theory is not essential. But, for the record, let me cite just a few statements which illustrate the point. Ullman, in a study of "Medieval Principles of Evidence" writes that the 14th century Postglossators held that the "indispensable requisite for the judge to form an opinion on the trustworthiness of witnesses was that they appear before him personally * * *. The personal impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behavior in court, were the only means of ascertaining whether their statements were trustworthy or not." Judge Frank has commented that "a deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand for it deprives—justice—of the advantage of having the witness before the jury." And as Sir John Coleridge observed, a cold record "cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration * * * it may be the dead body of the evidence without its spirit."

In his briefs, Judge Claiborne asked for a full trial before the Senate, by which he meant the right to call witnesses and have them questioned under oath before the Senate so that Senators could observe their demeanor. Clearly impeachment trials in the past have involved witnesses being heard by the full Senate. Yet only the "rule 11" committee heard the witnesses in this case and the committee did not make any formal findings relative to demeanor. Contrast that with the fact that even a master in equity must report to the court recommendations and findings on demeanor of witnesses if such findings are based at all on demeanor.

In opposition to both the respondent's argument and history, the House argued that a full trial was not required. They asserted that demeanor is simply one of a number of factors which make up credibility and, given the weight of evidence available—and the demeanor related judgments which we can assume the jury made. There was no need for the full Senate to see and hear witnesses directly. The record alone will suffice, they argued.

The House is partly right: demeanor is just one factor. But it can be a crucial factor, a deciding factor. And that is why we require witnesses to testify in open court and why we should have required them to testify before the Senate. As Judge Frank once wrote, "demeanor, to be sure, is no infallible guide to reliability of testimony; yet, as matters now stand, it is one of the best guides available." To a degree, even the Senate recognized the value of demeanor evidence when it authorized the "rule 11" committee to hold a hearing. After all, that hearing essentially covered the same ground that had already been covered in the courts. In other words, the Senate felt a need to develop its own record—as a result, 12 of us did hear and see witnesses, even though those 12 could have simply read their testimony in the record of a previous proceeding, the trial before the Federal jury.

The "rule 11" committee did an excellent job of developing a record. I have the greatest respect for the members and staff of the committee—they had a difficult job and they discharged it with dignity and devotion. The record they developed is essential to understanding the case. But, in my view, it was not adequate to let the Senate make findings in those disputed areas where witness demeanor or credibility is critical to the process of determining what the facts are. The Senate, as a finder of fact, did not hear or see a single witness. And, as a result, our ability to fairly reach decisions, when the facts were in dispute, was restricted.

To reach a judgment on issues involving disputed facts where the demeanor and credibility of the witnesses are important, I believe the Senate needed to see the witnesses—as the "rule 11" committee did—and not just see a record or even tapes of witnesses testifying.

When we voted not to hear any additional witnesses, we set up a process which made it impossible for the Senate, as the finder of fact, to fully and fairly evaluate the credibility of witnesses.

Now some might say that we did hear Judge Claiborne. He spoke to us. However, he did not appear before us as a witness; he was simply exercising his right to "participate in the summation" as Vice President Bush explained to the Senate. And while some have suggested that Judge Claiborne did not take the opportunity in his speech to answer specific allegations, the Senate did not ask him any questions about those allegations and his failure to respond specifically and in detail cannot be held against him. Indeed, the request, made in executive sessions by one Senator, to have Judge Claiborne appear as a witness and answer questions was rejected by the Senate.

So, as Judge Claiborne said, he was speaking primarily to let the Senate see him—which suggests that Judge Claiborne felt that there was some value in presenting his demeanor to the Senate. A similar value would have been attached to the appearance of a number of other witnesses.

ARTICLES III AND IV

While I could not on principle vote for a conviction on articles I and II, I believe that articles III and IV were proven. Let me discuss them briefly.

Article III asserts that Judge Claiborne was found guilty by a jury. His conviction, article III alleged, was indisputable evidence of misbehavior and high crimes in office. In my view, the record was more than sufficient to support the conviction.

Many of my colleagues had, it appears, concerns about this article. Two such concerns were expressed. First, it was argued that the Senate was, in essence, abdicating to the courts its responsibility as the sole authority to try impeachments and second, that this might set a precedent which suggests that any conviction must result in impeachment or, conversely, that any "not guilty" verdict would be grounds for a refusal to impeach a public official. Let me respond to both concerns.

As to abdication of responsibility, I must confess that I find it ironic that some are bothered about abdicating our responsibility by giving credibility to a final court judgment—if supported by the record—when, by refusing to hear witnesses, we in essence abdicated our responsibility as finders of fact—but, in this case, abdicated not in favor of a court but rather in favor of no one.

The record before the courts and the "rule 11" committee made it clear that the Senate could reach the conclusion that the conviction of the defendant was final and well supported by the record. That is precisely the conclusion I did reach in regard to article III. While the defense of Government misconduct is still pending, nothing in that appeal would alter the facts which were at the core of the judicial process that has been completed. And the results clearly established that Judge Claiborne was legally "found guilty by a 12-person jury of making and subscribing a false tax return. * * *"

As to the belief that conviction based on the fact of prior judicial determinations sets a precedent, that simply is not true. Again, the record before the "rule 11" committee and the House briefs made it clear that even in the face of a conviction, the Senate must satisfy itself relative to the guilt of the defendant. We may chose to take a final court verdict of guilty as evidence of guilt, provided that we are satisfied that the record supports that finding. We are not bound to so utilize a court judgment—but surely we are free to do so. And if we do so, no precedent is established thereby. To satisfy myself on that point, I solicited the views of Chairman Rodino. In his capacity as a House manager, he clearly did not advance a claim of precedent.

In my letter to the chairman, I asked the following question:

> Would a conviction by the Senate on article III set a precedent, or be used for argument in later impeachment proceedings, that the House of Representatives is bound to impeach and the Senate is bound to convict, following a Federal court conviction of a public official?

Chairman Rodino's response to me in a letter of October 9, 1986 was as follows:

> You have asked me to address whether a conviction on article III would bind the Senate to convict in future cases, in which a public official similarly had been convicted. On behalf of the House of Representatives, I respectfully submit that the answer to this question is no.

My letter and Chairman Rodino's response were made part of the record during our deliberations.

It seems clear, then, that the Senate, as the sole authority over impeachment, can, in essence, decide to credit or ignore a jury verdict for whatever reasons it thinks adequate.

It is also clear that a verdict of "not guilty" in a trial court does not restrict the Senate's freedom to act on articles of impeachment sent over from the House. Senator Heflin's question on this point and the Presiding Officer's answer in open session make it clear that the Senate has freedom to act as it deems fit even if a House-impeached official comes before us armed with a "not guilty" verdict rendered by a court or jury. We all know that a "not guilty" verdict by a jury is far different from a finding of innocent. And while a person may be "not guilty" in a court of law, that does not mean that they are or should be found "not guilty" of the high crimes and misdemeanors which justify a conviction in the Senate.

Finally, article IV asked the Senate to agree that Judge Claiborne's actions have "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute to the Federal courts and the administration of justice by the courts." I believe that article IV can be fairly construed as incorporating the article III reference to the jury finding and, as I have indicated earlier, my review makes it clear that the jury verdict was amply supported by the record.

In addition, in the past, article IV type language has been viewed as a "catch all" or "character" charge. Such articles serve the function of stating that conviction is desirable because the respondent has engaged in misbehavior sufficient to justify removal from office by the Senate. In that context, I believe that Mr. Claiborne deserved to be convicted by the Senate on article IV.

CONCLUDING COMMENTS

Having discussed the specific articles and the process which was used by the Senate to conduct this trial, I have three final observations to make.

First, I was greatly disturbed by the conduct that the Government was alleged to have exhibited in this case. The evidence clearly suggests that the Government engaged in a pattern of selective prosecution, prosecutorial overreaching, and perhaps intimidation of witnesses and other improprieties. I support a full investigation of those charges as they relate to Mr. Claiborne in particular and other cases as well. I should hasten to add that even if such conduct is proven to have existed, that would not alter my votes on the various articles of impeachment. While such Government action might bring Mr. Claiborne a reversal in the courts, the Senate, acting as a Court of Impeachment, operates under different standards. The exclusionary rule, for example, does not apply in these proceedings and in other areas our laws differ from those applied by the courts. So while Mr. Claiborne may or may not deserve judicial relief, he is entitled to no relief from the judgment of the Senate.

Second, I feel compelled to register my strong objection to the manner in which the question on article III was put to the Senate by the Presiding Officer. On articles I, II and IV, the question put to the Senate was phrased as required by the rules: "Senators, how say you? Is the respondent, Harry E. Claiborne, guilty or not guilty?" But on article III, the question was put this way: "Senators, how say you? Is the respondent, Harry E. Claiborne, guilty or not guilty or do you vote present? The results which followed, with 35 Senators voting present, may or not have resulted from the way in which the question was presented—but the form in which the question was put was erroneous and violative of both the rules and the unanimous-consent agreement under which we were operating.

Third, while I have criticized the Senate for refusing to allow certain witnesses to be called and for other failures which I observed, I also want to compliment this body and my colleagues for their honest concern about commitment to the process. I have already indicated that the "rule 11" committee functioned magnificently; I indicate now that the staff of the Office of the Senate Legal Counsel and the Rules and Ethics Committees were also most supportive. And while my colleagues and I agreed on some issues and disagreed on others, I believe we shared a common desire to achieve justice as we understood it. Those who observed the seriousness with which the Senate viewed these proceedings have observed a free society at its best.

STATEMENT OF SENATOR ALBERT GORE, Jr.

Mr. Gore. Mr. President, the Constitution of the United States establishes that Federal judges shall serve during "good behaviour." Article III, section 1. It further provides that:

> The President, the Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

Article II, section 4. The House of Representatives is empowered to draft articles of impeachment and the Senate possesses "the sole Power to try all Impeachments." Article I, section 6.

When the framers adopted the British model and assigned the impeachment power to the House and Senate, they recognized the important and difficult role that impeachments serve in protecting the public trust:

> A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from a nature which may with peculiar propriety be denominated "political," as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many it will connect itself with the preexisting factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of the parties, than by the real demonstrations of innocence or guilt. * * * The convention, it appears, thought the Senate the most fit depositary of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it. (Federalist No. 65.)

Six centuries of experience with impeachments in Great Britain and the United States serve as a guide.

Impeachment articles have been brought against 12 Federal officials. Of those, six resulted in acquittal, four in removal and two in dismissal.

Prior to the Senate floor proceeding concerning this matter, I served as a member of the Senate Impeachment Trial Committee established pursuant to rule XI of the Senate Impeachment Rules. Though never used prior to this proceeding, the committee process was established in anticipation of the last impeachment proceeding to come before the Senate, some 50 years ago. The procedure is consistent with the British system as well as the Supreme Court's practice when considering cases pursuant to its Article III original jurisdiction provision. Compare N. Williams, "The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials," 50

N.Y.U. L. Rev. 512 (1975) with R. Berger "Impeachment, the Constitutional Problems" (Harv. Univ. Press 1973). The committee heard testimony of witnesses called by the House managers and Judge Claiborne over a period of 7 days. Over a dozen witnesses testified, including Claiborne. Transcripts and videotape recordings of the committee proceedings have been made available to the full Senate.

Based on the testimony adduced, the numerous exhibits and pleadings submitted in this proceeding, and the arguments of counsel, I have voted in favor of conviction on Articles I, II, and IV of the Articles of Impeachment. Because Claiborne has been afforded a full trial before the Senate, consideration of the third Article is not necessary.

BACKGROUND

Claiborne was convicted on two tax charges and sentenced to 2 years in prison plus fines in October 1984. He had been indicted in early 1984 on bribery, tax, and Ethics in Government Act charges. His first trial resulted in a hung jury and he was retried in on the tax and Ethics Act charges. The conviction after the second trial was affirmed by the Ninth Circuit Court of Appeals and the Supreme Court declined to review the case. He has exhausted his direct appeals. He began serving his sentence in May of this year and has filed two motions for collateral relief in Federal district court.

ANALYSIS

The House of Representatives, presented four Articles of Impeachment of the Senate. A two-thirds vote in favor of conviction on any one of the Articles is sufficient to warrant removal from office. The first two Articles stem from the facts giving rise to Claiborne's conviction under 26 U.S.C. 7206(1) for willfully making and subscribing false tax returns in 1979 and 1980. The third Article seeks removal from office because of the felony conviction. The fourth Article urges removal because Claiborne's false income statements on his 1979 and 1980 Federal tax returns "betrayed the trust of the People of the United States and reduced confidence in the integrity and impartiality of the judiciary."

The elements of an offense under Section 7206(1) are as follows:

> (1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. *Marabelles,* 724 F.2d 1374, 1380 (9th Cir. 1984). Since there is virtually no dispute that the tax returns at issue failed to report taxable income, the gravamen of the offense in this instance is the element of "willfullness."

The Supreme Court has concluded that willfulness does not require a finding of a bad purpose or evil motive, but rather that "willfulness simply means a voluntary, intentional violation of a known legal duty." *United States* v. *Pomponio,* 429 U.S. 10, 12 (1976). Just as "willfullness" does not connote an evil motive on the one hand, it does not embrace conduct which is merely negligent or mistaken on the other. E.g., *United States* v. *Daniels,* 617 F.2d 146, 148 (5th Cir. 1980).

Courts infer willfulness from the presence of any of a variety of factors in cases under 26 U.S.C. 7206, including, for example:

> Such circumstantial evidence as "a consistent pattern of understating large amounts of income, coupled with evidence of falsehood, surreptitious cash transactions and inadequate records kept by the taxpayer," substantial understatement of taxable income and tax liability for the years in question, the withholding of material information from the taxpayer's bookkeepers by giving them only summary sheets of the records in question, and the expenditure of large amounts of cash that cannot be reconciled with the amount of income reported.

United States v. *Hughes,* 766 F.2d 875, 878 (5th Cir. 1985). Virtually all of these factors are present in this case.

A. THE 1979 TAX RETURN

In addition to his 1979 judicial salary, Claiborne received $41,072.93 in ordinary income, pursuant to a legitimate feesplitting arrangement with his former business associates. Only half of the additional income was reported on his 1979 tax return. His conduct leading to the preparation and filing of the return virtually assured that some or all of his fee income would go unreported.

The money was received in the form of 14 checks, cashed at local casinos. This was a significant departure from his financial practice over the three previous decades. Prior to assuming the bench, all of his legal fee checks were deposited into bank accounts which were tracked by his accountant who, in turn, received bank statements for the accounts and copies of deposit records. Claiborne directed Joseph Wright, an accountant who kept the books for his law practice and prepared his tax returns, to treat all deposits as income unless specifically directed otherwise. Wright also understood that he was to give the Government the benefit of the doubt if questions arose.

The respondent opted for this practice in order to "show every penny" that passed through his office. After adhering steadfastly to the practice for many years, he abandoned it in favor of cashing the checks at casinos in 1979 for, as he claimed, convenience and the need for "pocket money." Claiborne did not inform Wright that he had begun cashing legal fee checks at casinos, and he stopped providing Wright with any information setting forth his additional income. He instead chose to record the amounts periodically in a personal diary he began keeping.

Claiborne eventually provided Wright with conflicting information regarding the precise amount of his 1979 income. In March 1980 he crafted a memorandum for Wright which purported to detail his 1979 fee earnings. Curiously, he based the figures upon "bank deposits" that he believed were fee income, apparently forgetting that the fee checks in question included many which had been cashed rather than deposited. Claiborne prepared the memorandum in order to secure a bank loan with Wright's help. Composed from memory because he had misplaced his financial diary, the memorandum estimated the fee income as about $46,000, roughly twice the amount later reported on his taxes and twice the amount he later told Wright.

To compound matters, Claiborne later suggested to Wright over the telephone that only four of the seven items listed in the March 1980 memorandum could be characterized as fees. The four items totaled $22,332.87. He listed a similar amount on his judicial ethics disclosure. He told Wright the remaining items in the memorandum constituted interest income, proceeds from a time certificate of deposit and the sale of an airplane.

Though unsure of the details of the conversation, Claiborne acknowledges that he described at least one item as nonfee income. Wright had no other means of ascertaining Claiborne's income; his notations on the document itself are consistent with his testimony and could have been generated either through guesswork or through the telephone conversation he had with his client. Finally, Wright's testimony is consistent with the prior practice of treating all deposits as income unless directed otherwise.

Claiborne interposes a number of claims in defense. He asserts, for example, that he cashed the fee checks in 1979 rather than depositing them in his bank accounts in order to obtain "pocket money." While $40,000 over the course of several months may resemble pocket money to some, the significance of Claiborne's behavior lies in its stark departure from a history of depositing fee checks in bank accounts so as to allow his accountant to maintain accurate income records. Whatever the reason for the change, the record clearly shows that its effect was to leave no bank record of the receipt or cashing of these checks. Claiborne thereby denied Wright the very information necessary to account for the additional income.

The lynchpin of his defense to the 1979 tax charge is his claim that on April 11, 1980, he sent Wright a letter stating his fee income, together with his W-2 form and a check. Wright neither recalls requesting the letter nor has a recollection of it. He has not been able to produce a copy from his files. Judy Ahlstrom, Claiborne's secretary, apparently delivered the information to Wright and she corroborates Claiborne's claim regarding the delivery of the information and its general contents. This testimony, however, is at odds with common sense and with the testimony of Wright and his wife who also worked in the accounting office.

None of the witnesses on this issue was particularly compelling, although the evidence suggests that Ahlstrom delivered something to Wright's office on April 11, 1980; whether the delivery included the April 11 letter is not clear. Claiborne did not see the completed tax return, having signed it in blank prior to leaving town on business.

Although several possible scenarios suggest themselves, only one seems plausible. On the one hand, the April 11 letter could have been delivered to Wright's office, only to be the one item from the relevant file which was later lost or stolen, leaving Wright with only the earlier memorandum and telephone data from Claiborne as to his income. Under these scenarios, Claiborne gave his accountant conflicting information, at best.

The more plausible scenario is that the self-serving story behind Claiborne's April 11 letter is fictitious. By April 11, his accountant had at least two statements of his 1979 fee income, a circumstance fully consistent with Wright's contention that the April 11 letter was not requested. Claiborne questions the credibility of the Government's witnesses on this issue, pointing to their failure to recall burglaries of their premises and a move which could have caused the loss of the April 11 letter; he has not, however, suggested a convincing motive which would explain why they would adjust their stories. Moreover, no other documents from the file were misplaced.

Too many leaps of logic are required to accept his defense. Many of the factors surrounding the preparation and filing of his 1979 return are factors from which courts readily infer willfulness. Most important, if he did not know precisely what was reported in the 1979 tax return, he certainly should have known that his behavior served only to confuse his accountant and prevent him from developing an accurate picture of his true income.

B. THE 1980 TAX RETURN

Claiborne's 1980 tax return also underreported his income. That discrepancy allowed him to pay only $1,103 in taxes rather than $97,864. The difference was attributable to his failure to report $87,912 in legal fee income and the improper treatment of the tax consequences flowing from the sale of his home.

Although the precise facts are not entirely clear, the record demonstrates that Claiborne abandoned his longtime accountant, Joseph Wright, and retained creative tax consultants, headed by Jerry Watson. In contrast to the $600 annual fee charged by Wright for bookkeeping and preparation of tax returns, Watson earned $2,000 for his work on the 1980 tax return. That fee was measured in part by the size of the refund Watson was able to generate.

The change in accountants was the result of a belief that Wright was no longer interested in keeping the respondent as a client, combined with the fact that Watson happened to impress the respondent with his ability. While Claiborne was apparently unaware of Watson's nefarious reputation in the community, Watson held himself out as one willing to generate tax savings through "innovative" means. Since Claiborne was well aware of the substantial tax liability he faced in 1980, Watson's "talents" certainly factored into the decision to retain him and discard Wright. That conclusion is buttressed by the timing of Claiborne's decision to change accountants: after Watson suggested that he could dramatically reduce Claiborne's tax liability.

Watson developed a method to treat the sale of Claiborne's home as a tax free transaction, notwithstanding a taxable gain of over $200,000. Despite the fact that his erstwhile law practice did not have the requisite cost basis to substantiate such a claim, Watson also recorded a "loss" based upon the termination of Claiborne's law practice when he became a judge. The two men discussed these plans.

Chief among his claims in response, Claiborne rejects the inference that he abruptly switched accountants in order to gain the services of someone more willing to engage in tax law brinksmanship. He adds that he neither read the completed 1980 tax return, nor understood or was aware of the import of Watson's dubious calculations. Whether he read the return prior to filing, he acknowledges discussing with Watson the notions of claiming the gain from the home sale as a tax free transaction and taking a loss on his former law practice. He recognized within days after the filing that the return may well have been faulty, but was assured by Watson that two experienced Internal Revenue Service officials had vouched for the accuracy of the calculations. Notwithstanding his uneasiness with the return and the sizable refund it yielded, Claiborne retained Watson's services for two additional years and took no steps to check the 1980 tax return further.

Claiborne's conduct compels the conclusion that he willfully understated his 1980 income. Whether he was truly unaware of how incorrect his tax return was, he certainly turned a blind eye to questionable circumstances which otherwise would have been obvious to him. His change in accountants suggests a desire to conceal income. He resorted to extensive cash transactions. He underreported a significant amount for a second year in a row.

CLAIMS OF GOVERNMENTAL MISCONDUCT

Claiborne has urged the Senate to permit him to call several dozen witnesses ranging from prosecutors and investigators to the trial judge in his criminal proceeding. He contends that their testimony will reveal a vendetta which led to his conviction, and an unwillingness of several dozen Federal judges to expose its illegality out of fear that public opinion would question whether the vendetta issue was a mere subterfuge erected to protect a fellow jurist.

Even assuming all of Claiborne's allegations of governmental misconduct to be true, the same conclusions as to his conduct obtain. No individual claim or combination of claims can or should detract from the conclusion that he willfully submitted false income tax returns in 1979 and 1980. The Senate need go no further than it already has in assessing the merits of these claims. Although Claiborne views these theories as the overarching issue in this proceeding, he is mistaken.

His contention seems to be that but for a vast conspiratorial vendetta, his innocence would have been proven or the charges would never have been brought. Claiborne contends that full consideration of his claims on this score leads to several conclusions which will exonerate him. Specifically, he suggests that Federal prosecutors pursued him so relentlessly and unscrupulously that they bargained for perjured testimony from a known criminal and spearheaded an illegal burglary of his home in search of inculpatory evidence. He claims that exculpatory evidence was withheld and that witnesses were either intimidated or unfairly coached. If accurate, these claims warrant serious scrutiny and I have cosponsored legislation to establish a special subcommittee to investigate the issue further. If the claims have merit, steps should be taken to rectify the wrong. Remedial measures, however, will in no way abrogate the finding that Claiborne engaged in impeachable conduct.

He further asserts that he could not have had the requisite willful intent, given the predisposition of Federal prosecutors; that claim rests on the notion that no one whose every move is under intense scrutiny by Federal prosecutors would willfully violate the law or knowingly submit such faulty tax returns. This assertion is untenable, given the clear findings regarding Claiborne's conduct.

Claiborne alleges that sympathy for prosecutors and fear of public criticism led several dozen Federal judges to gloss over his defenses. He points to two dissenting appellate opinions in his case suggesting that some of the members of the reviewing panel may have rendered their decision without fully examining the record. Conveniently, Claiborne fails to address the fact that the Supreme Court, when presented with the full record in his case and the dissenting opinions upon which Claiborne now relies, also refused to overturn his criminal convictions.

Finally, Claiborne points to the departure from typical tax investigation procedures as an indication that he received uniquely harsh treatment. He contends that he was denied opportunities to negotiate with the Internal Revenue Service which would have obviated the need to resort to a criminal indictment. In so claiming, the respondent joins the many who believe that the discretion of the Internal Revenue Service and Federal prosecutors in deciding whether to pursue criminal charges is overbroad and should be curtailed. The law currently provides that discretion. Whether it should is a question which may well warrant inquiry but does not alter the finding in this proceeding.

CONCLUSION

The conclusion is inescapable that Claiborne filed false income tax returns and that he did so willfully rather than negligently. While I do not believe that the Senate must apply a reasonable doubt standard in impeachment proceedings, I nevertheless believe that Claiborne has advanced no reason to doubt the conclusions that I have reached about his conduct.

Although a convicted felon, Claiborne arrived before the Senate as a member of the Federal judiciary. He has been afforded the procedural protections which the Constitution reserves for that important position. Given the circumstances, it is incumbent upon the Senate to fulfill its constitutional responsibility and strip this man of his title. An individual who has knowingly falsified tax returns has no business receiving a salary derived from the tax dollars of honest citizens. More importantly, an individual guilty of such reprehensible conduct ought not be permitted to exercise the awesome powers which the Constitution entrusts to the Federal judiciary.

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR. COMMENDING THE STAFF OF THE SPECIAL COMMITTEE ON IMPEACHMENT

Mr. MATHIAS. Mr. President, the Senate recently completed an extraordinary proceeding, carried out by an unprecedented method. The proceeding, of course, was the impeachment trial of Harry E. Claiborne. For the first time in half a century, the Senate was called upon to decide whether or not to remove a Federal judge from the bench. A key element of the process of making the decision was the establishment, for the first time in the history of the

Senate, of a special committee to receive the evidence relevant to the impeachment trial. The role of the Senate Impeachment Trial Committee established by Senate Resolution 481 has been the subject of a great deal of debate during the Senate's consideration of the Claiborne impeachment. That debate will no doubt continue, particularly when the Senate is next called upon to try an impeachment and looks to the Claiborne precedent. As chairman of this special committee, I speak now, not to enter that debate, but simply to offer my thanks to the many people whose conscientious work and thoughtful counsel enabled the special committee to discharge the duty assigned to it by the Senate.

Of course, the 11 Senators who served with me on the committee deserve recognition. Each of them took this unusual assignment seriously; each one made an important contribution to the committee's work. I know that the vice chairman of the committee, Senator Sarbanes, joins me in thanking them for their efforts and for their consistent attendance.

But every member of the impeachment committee would acknowledge that we could not have performed our assignment without the hard work of the committee's staff. When the committee was established, no special provision was made for staff support. It was thus necessary to seek staff from other assignments. Thus, every member of the special committee's staff was called upon to perform double duty, a burden made even heavier by the fact that the committee's busiest period coincided with the hectic concluding weeks of the 99th Congress.

The committee could not possibly have carried out its responsibilities without the advice and assistance of Michael Davidson, the Senate Legal Counsel. Mike's daily responsibilities are quite daunting by themselves. He and his small staff are the Senate's lawyers, responsible for representing this Chamber's interests in a burgeoning docket of actual and threatened litigation before the Federal courts. In the closing hours of the impeachment proceeding, Mike played his accustomed role, defending the Senate against an application by Judge Claiborne for a temporary restraining order enjoining a vote on the Articles of Impeachment.

But much earlier in the process, even before the establishment of the special committee, Mike Davidson had put his incisive legal mind to the task of advising the Senate on its discharge of this constitutional duty. After he was appointed as counsel to the special committee, he devoted long hours to framing the legal issues presented, advising the chairman on evidentiary and other rulings, and maintaining cordial and effective lines of communication with all parties. His skill and judgment were invaluable resources of which the committee frequently availed itself as it sought to navigate through the uncharted waters of this unprecedented proceeding. When the matter moved to the full Senate for the trial phase, Mike Davidson was on hand to advise the Presiding Officer. He acquitted himself throughout with distinction, and the entire Senate owes him its thanks.

To the staff of the Committee on Rules and Administration fell the task of making all the logistical arrangements necessary for the committee to do its job. Under the direction of John Childers, staff director of the special committee, staffers prepared the venues for the committee meetings and hearings and the Senate trial; docketed and distributed mountains of pleadings, memorandums, and other documents; cataloged exhibits; maintained security; informed the press; and took care of a myriad of other essential details. In addition, Anthony L. Harvey, the committee's chief clerk, worked with Parliamentarian Emeritus Floyd M. Riddick, a pro bono consultant to the committee, on a compilation of the relevant Senate rules and precedents; and, with his assistant, Byron Hoover, coordinated with W.A. Dowless and with Joseph P. Patterson, Jr. of the Government Printing Office the speedy preparation of four volumes of transcript and other materials for the use of the Senate. John Rixey, the deputy staff director; Gerald Gereau, the security coordinator; and Ann Pincus and Randy Dove, press officers, also made valuable contributions, as did Carole Blessington, Kimberly Austin, and Gail Martin of the Rules Committee staff.

Finally, each member of the committee designated staffers to assist in preparing for the hearings and analyzing the testimony received. I ask unanimous consent that a list of the Members' staff representatives be printed in the Record at this point.

There being no objection, the list was ordered to be printed in the Record, as follows:

MEMBERS' STAFF REPRESENTATIVES

Senator Mathias, Chairman: Steve Metalitz, Matthew Gerson, and Eileen Mayer.
Senator Hatch: Randall Rader, Michael Chadwick, and Dee Benson.
Senator Warner: Jean Barrett.
Senator Rudman: Paul Barbadoro, and Wilson Abney.
Senator Pressler: Bob Samors.
Senator McConnell: Bill Short, and Larry Harman.
Senator Sarbanes, Vice Chairman: Marty Gruenberg, and Marvin Moss.
Senator Heflin: Karen Kremer, and Tom Young.
Senator DeConcini: Bob Feidler and Doug Drury.
Senator Pryor: David Smith and Jeff Trinca.
Senator Gore: Goody Marshall and Peter Sage Knight.
Senator Bingaman: Faith Roessel and Edwin Jayne.

Mr. MATHIAS. Mr. President, all of these men and women contributed to the work of the Senate Impeachment Trial Committee on the impeachment of Harry E. Claiborne. Their competent work, under stringent time pressures, enabled the committee to carry out the difficult and unprecedented task assigned to it by the Senate. I know that every member of the committee joins me in thanking them for their dedication to this task.

○